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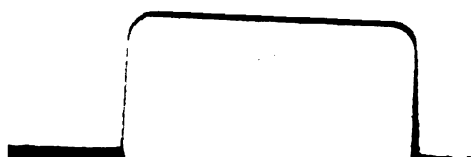
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THE
REVISED REPORTS

BRING
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IN THE
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FROM THE YEAR 1785,
AS ARE STILL OF PRACTICAL UTILITY.

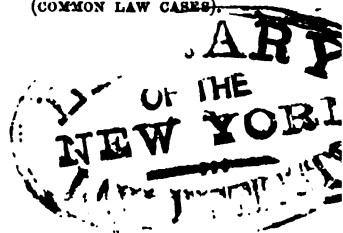
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1852-1854.



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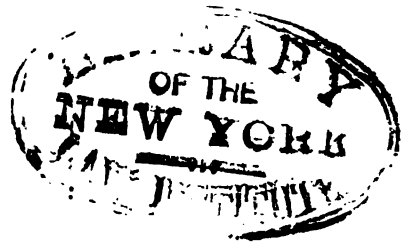


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PREFACE TO VOL. XCIV.

MORE than one hundred pages are occupied, after such condensation of the opinions given by the Judges to the House of Lords as we thought permissible, by the report of *Egerton v. Earl Brownlow* (p. 1). The House being, as we know, judicially infallible, we must believe that this case is still a leading authority for something; but, since Baron Parke's opinion given against that which ultimately prevailed (see at p. 23 below) has now been quoted with approval in the House itself (see [1902] A. C. 496, 507) and public policy has been declared by the late Lord Davey and by Lord Lindley to be "an unsafe and treacherous" or "a very unstable and dangerous" ground of decision (*Janson v. Driefontein Consolidated Mines* [1902] A. C. 484, 500, 507), it does not appear likely that the authority of *Egerton v. Brownlow* will be heard of again to any practical effect unless a closely similar case should recur. One cannot help suspecting that, in the minds of the majority of noble and learned Lords who decided the case and the minority of the Judges summoned to advise them, zeal to keep the fountain of honour pure beyond suspicion and to rebuke the machinations of an ambitious testator was not unmingled with dislike to letting variations on the theme of shifting uses go beyond the tolerably familiar name and arms clause—in short, to fancy conveyancing. The dispositions of the seventh Earl of Bridgewater's will were known in the profession many years before the time came for testing their validity, and Lord Eldon was believed to have expressed his private opinion that they could not be supported. In this case the opinion of all the Judges consulted except two was overruled, though not unanimously, by the House of Lords; this result was

curiously paralleled a generation later in *Allen v. Flood*, and the authority of that case too, as at first understood, had been somewhat qualified by later decisions of the same tribunal.

Jefferys v. Boosey, p. 389, presents an equally striking difference of judicial opinions upon the question—whether however was not and could not be actually decided, and some of the Judges was not touched at all—whether there was copyright at common law, as well upon the point involved in the construction of a statute now superseded. But here the House of Lords was unanimous. The opinions which deal with this high question of natural justice (in the admitted absence of settled authority, or any established authority at all, it was treated as a matter of first principle throughout) are a classical repertory of the arguments on both sides. Most lawyers nowadays accept the doctrine advocated by Chief Baron Pollock and Baron Parke: it was accepted by Lord Brougham and Lord St. Leonards. A certain number of men of letters have strenuously maintained the contrary view that natural justice, in virtue of a supposed “property in ideas,” demands the recognition of perpetual copyright. Some of them testified before the Commission on Copyright which sat thirty years ago. It made several other and more practical recommendations with next to no result to this day: such is the interest of our rulers, and I fear we must add of average British voters, in the welfare of literature and art.

Murray v. Bogue, p. 693, disposed of minor points of copyright law which are not likely to give trouble again, but the judgment is still instructive. We learn incidentally that Bædeker’s guide-books, or some of them, were originally founded on Murray’s. Now Murray’s fame is multiplied, and “one Bædeker” has become famous too, while the two series have such marked and distinct individuality in method as well as details that no one could think either was copied from the other. We may observe that nowadays some authors and publishers act on the assumption that

copyright-owner's licence is required to authorize even the shortest quotation from a published work. It is clear that Kindersley, V.-C. did not think so, and we are not aware of any later authority which justifies such a contention.

Maunsell v. Hedges, p. 532, is one of the line of high authorities which ought to have exploded, much sooner than they finally did, the fallacy that there is a kind of "representation" not amounting to a promise and yet capable of producing an "engagement" which, though not a contract, will be enforced by equitable remedies. One or two Vice-Chancellors, however, clung to this notion for quite twenty years more. The word "engagement" must have had a certain fascination for the Equity Bar in the third quarter of the nineteenth century. For a while it became a special term of art in the cases on married women's acts binding their separate property, and it was freely used instead of "agreement" or "promise" in the original draft of the Indian Contract Act prepared about forty years ago by the Indian Law Commission in England, which included at least one eminent equity lawyer.

Waldron v. Sloper, p. 642, is an important authority on the delicate questions of equitable priority which arise between personally innocent incumbrancers of whom one or the other must suffer by the fraud of a third person.

The House of Lords, which will not let a cause stand over indefinitely (p. 562), is less patient than the Supreme Court of the United States. In 1903 that august tribunal intimated its opinion that a suit between the States of New Jersey and Delaware, in which an interim injunction had been granted thirty years earlier, had better be brought to a hearing. Certain preparations were made for what might have been a memorable litigation between two sovereign States, involving investigation of the earliest colonial grants affecting their present territory ; but the end, we believe, was a settlement out of Court.





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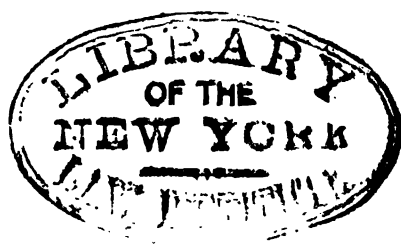
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ERRATUM.

93 R. B. Preface, v, line 20, for "Ansübung" read "Ausübung."

NOTE.

The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.



The Revised Reports.

VOL. XCIV.

IN THE HOUSE OF LORDS.

EGERTON v. EARL BROWNLOW.

(4 H. L. C. 1—256 ; S. C. 23 L. J. Ch. 348 ; 18 Jur. 71.)

A contingent gift or interest has a real existence, capable, as much as a vested interest or estate, of being operated upon by a condition subsequent, even though the condition will necessarily take effect (if at all) before the contingency can happen.

The Earl of Bridgewater by his will devised very large real estates to trustees to make a settlement according to the limitations mentioned in the will. One of these limitations was "to Lord Alford for and during the term of ninety-nine years, if he shall so long live;" remainder to trustees during his life to preserve contingent remainders; "remainder to the use of the heirs male of his body, with remainder, in default of such issue, to the use of C. H. C. for the term of ninety-nine years, if he shall so long live;" remainder to trustees to preserve contingent remainders; "remainder to the use of the heirs male of the body of C. H. C., subject, nevertheless, as to the several uses and estates so to be limited to Lord Alford and C. H. C., and to the trustees during their respective lives, and to the heirs male of their respective bodies, to the several provisos for the determination thereof hereinafter contained." The testator then declared "that in the settlement to be made pursuant to this my will, my said estates are not to be limited successively to the use of the first and other sons of Lord Alford or of C. H. C., in tail male, but to the heirs male of their respective bodies, in the words of this my will, it being my intention that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of the said Lord Alford and C. H. C. respectively." The testator then provided, "that if Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater to him and the heirs male of his body, then, and in such case, the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void." There was a similar proviso as to Lord Alford acquiring such title within five years after he should succeed to be Earl Brownlow, and unless he did so, the testator directed that the estate limited, &c. (as before) "shall thenceforth cease and be absolutely void; and my real

1853.

June 23, 24,

27, 28, 30.

Aug. 1, 12, 19.

Lord
LYNDHURST.

Lord
BROUGHAM.

Lord
TREURO.

Lord St.
LEONARDS.

Lord
CRANWORTH,
L.C.

The following
judges
attended :

POLLOCK,
C.B.

CROMPTON, J.

WILLIAMS, J.

CRESSWELL,
J.

TALFOURD, J.

WIGHTMAN,
J.

ERLE, J.

ALDERSON, B.

COLERIDGE,
J.

PARKE, B.

PLATT, B.

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estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if the said Lord Alford were actually dead without issue male." Lord Alford entered into possession of the estates, but died without acquiring either of the titles, leaving an heir male :

Held, (1) That the proviso was in the nature of a condition subsequent (1); (2) That the proviso was void, as being against public policy (2); and (3) That consequently the eldest son of Lord Alford was entitled to the estates under the limitation "to the use of the heirs male of his body."

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JOHN WILLIAM, the seventh Earl of Bridgewater, deceased, was, at the time of his death, possessed of very large real estates in several counties in England, and also of personal estate of great value. On the 31st of March, 1823, he made a will duly executed and attested as by law was then required for the devise of freehold estates. By this will he gave to his wife, during the term of her natural life, the clear yearly sum of 12,000*l.* of lawful money of Great Britain, to be charged upon certain estates in Salop and Chester, and likewise an annuity of 4,000*l.* to the Right Honourable Sir Charles Long, and to his wife Lady Long (the testator's niece), for their respective lives, charged upon the same estates; and subject to these charges he devised all his estates, whatsoever and wheresoever, "unto and to the use of the Right Honourable John, Earl Brownlow, the Right Honourable, Edward Herbert, Lord Viscount Clive, and the said Sir Charles Long, their heirs and assigns for ever, upon trust, by such conveyances or assurances as shall be deemed expedient, or counsel shall advise, to convey and assure, settle and limit all my said hereditaments and real estates hereinbefore devised, with their appurtenances, to the several uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisos, limitations, and declarations hereinafter by this my will declared and directed concerning the same; and in the mean time to permit and suffer my said hereditaments and real estates to be held and enjoyed by, or to pay, apply, and dispose of the rents, issues, and profits thereof, unto or for the benefit of such person or persons, or for such intents and purposes as the same would go or belong to or be applicable if such settlement had been actually made pursuant to this my will: And I will and direct that such conveyance and settlement shall be to the use of the heirs of

(1) On this point see *In re Greenwood* [1903] 1 Ch. 749, 72 L. J. Ch. 281, 88 L. T. 212, C.A.; *In re Hope-Johnstone* [1904] 1 Ch. 470, 73 L. J. Ch. 321, 90 L. T. 253.

(2) On the question of public policy

see *Janson v. Driefontein Consolidated Mines, Limited* [1902] A. C. at p. 507, 71 L. J. K. B. 857, 87 L. T. 372; *Windhill Local Board v. Vint* (1890) 45 Ch. D. 351, 59 L. J. Ch. 608, 63 L. T. 366.—O. A. S

my body; remainder to the use *of the trustees, &c." There were then certain limitations in favour of his brother's son in tail male, which never took effect, remainder to the use of his wife for life, without impeachment of waste, and from and after her decease, "to the use of the said Dame Amelia Long for the term of ninety-nine years, if she shall so long live: remainder to the said John, Earl Brownlow, and Edward Herbert, Lord Viscount Clive, and their heirs, during her life, in trust to preserve contingent remainders: remainder to the use of the heirs male of the body of the said Dame Amelia Long: remainder to the use of the Right Honourable John Hume Cust, commonly called Lord Viscount Alford, the eldest son of the said John, Earl Brownlow, by my niece, Sophia Lady Brownlow, his late wife, deceased, for and during the term of ninety-nine years computed as aforesaid, if the said John Hume, Lord Viscount Alford, shall so long live: remainder to the use of the said Edward Herbert, Lord Viscount Clive, and Sir Charles Long, and their heirs, during the life of the said John Hume, Lord Viscount Alford, in trust to preserve contingent remainders: remainder to the use of the heirs male of his body: with remainder, in default of such issue, to the use of the Honourable Charles Henry Cust, second and only younger son of the said John, Earl Brownlow, by the said Sophia, Lady Brownlow, his late wife, for the term of ninety-nine years, computed as aforesaid, if he the said Charles Henry Cust shall so long live: remainder to the use of the said Edward Herbert, Lord Viscount Clive, and Sir Charles Long, and their heirs, during the life of the said Charles Henry Cust, upon trust to preserve contingent remainders: remainder to the use of the heirs male of the body of the said Charles Henry Cust: subject nevertheless, as to the several uses and estates so to be limited, to the said John Hume, Lord Viscount Alford, and Charles Henry Cust, and to the trustees during their respective lives, and to the *heirs male of their respective bodies, to the several provisoes for the determination thereof hereinafter contained." Then followed remainders to Wilbraham Egerton, of Tatton, Esq., for life; then to trustees to preserve, &c.; then to William Tatton Egerton, eldest son of the said Wilbraham Egerton; then to trustees to preserve; then to the first and other sons of the said William Tatton Egerton, "severally and successively according to seniority, and the heirs male of their respective bodies, every elder son and his issue male to be preferred to the younger son and his issue male." There were similar remainders to all the sons of the said Wilbraham

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Egerton, and remainders to other persons, after which the will proceeded thus : " With remainder to the use of my own right heirs for ever. And I declare, that in the settlement to be made pursuant to this my will, my said estates are not to be limited successively to the use of the first and other sons of my said brother, or of the said Dame Amelia Long, or of the said Lord Viscount Alford, or of the said Charles Henry Cust, in tail male, but to the heirs male of their respective bodies, in the words of this my will ; it being my intention that the vesting of my estates in the heirs male of their respective bodies shall be suspended during the lives of my said brother, the said Dame Amelia Long, the said Lord Viscount Alford, and the said Charles Henry Cust, respectively. Provided, and I declare my will to be, that every person who shall be entitled under the uses and limitations of this my will, or any settlement pursuant thereto, to the beneficial enjoyment of my said estates, or any part thereof, for any term of years determinable on his death, or as tenant for life in possession, or as tenant in tail in possession, shall take and assume, or shall retain, as the case may require, the surname and arms of Egerton only, and shall at all times thereafter continue to use and bear such surname and arms, and no others ; and that in case any such person not then having *such surname and arms shall neglect or refuse to assume and take the same for six calendar months after he shall become so entitled in possession, or having then or having within the time so limited assumed and taken such surname and arms, shall afterwards discontinue to use and bear the same, or assume or use any other surname, or bear any other arms than the name and arms of Egerton, then, and in every such case, the use and estate directed to be limited to every such person so refusing, neglecting or discontinuing to use the name and arms of Egerton only, who shall take for a term of years determinable on his death, or for his life, and also the use or estate directed to be limited to trustees and their heirs during his or her life, for preserving contingent remainders and the trusts thereof, and also the use or estate directed to be limited to the heirs male of his body, or all such of the uses or estates directed to be limited to the sons of any such person in tail male, as for the time being shall be in contingency or suspense, as the case may happen, shall thereupon cease, determine, and be void ; or if the person so refusing, neglecting, or discontinuing to use the name and arms of Egerton only, shall be tenant in tail, whether by purchase or descent, under or according to the uses or limitations declared or directed by this my

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will, then the estate tail limited to or vested by descent in him shall absolutely determine and be void ; and that thereupon my said estates shall go over and stand limited to the posterior uses and limitations thereof declared or directed by this my will, and the powers, privileges, and authorities annexed to the same, and the trusts and purposes to be declared thereof respectively shall be advanced and take effect as if the use or estate, uses or estates, so directed to determine, had never been created, and so *toties quoties* ; and that every person so assuming and taking the surname and arms of Egerton, in compliance with such proviso, *shall apply for and use his utmost endeavours to obtain, as soon as reasonably may be, his Majesty's license or authority under his Sign Manual, or an Act of Parliament to sanction the same ; and every person neglecting or refusing so to do shall be deemed to have refused to take such surname and arms as aforesaid, and the said proviso shall take effect accordingly as if he had actually refused so to do ; but that notwithstanding such proviso, any person succeeding to the enjoyment of my said estates, and having any title of honour, shall be at liberty to retain the same, except as hereinafter provided in respect to the said John Hume, Lord Viscount Alford, and Charles Henry Cust. Provided always, and I declare my will to be, that the uses and estates hereinbefore directed to be limited to the said Dame Amelia Long for ninety-nine years, if she shall so long live, and to trustees for her life to preserve contingent remainders, and to the heirs male of her body, shall cease and be void in case there shall not be any issue male of her body lawfully begotten living at the determination of the several precedent uses or estates hereinbefore directed to be limited during the life of my said brother, and to the heirs male of his body, and to my said wife, and that in such case my said estates shall go over and be settled and limited as if the said Dame Amelia Long were actually dead without issue male ; nevertheless, without prejudice to the said annuity hereinbefore given to the said Sir Charles Long and Dame Amelia Long, which shall in such case continue charged on my said estates in Shropshire and Cheshire, and be payable to them respectively as I have hereinbefore directed : Provided always, and I declare my will to be, that in case the use or estate hereinbefore directed to be limited to my niece, the said Dame Amelia Long, for the term of ninety-nine years, shall be determined in her lifetime by virtue of the proviso lastly hereinbefore contained, *my said estates in Shropshire and Cheshire hereinbefore charged with

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the payment of the said annuities of 4,000*l.* to the said Sir Charles Long and Dame Amelia his wife respectively, shall also be charged and chargeable in addition to such of the same annuities as shall for the time being be payable with the payment of an annuity of 8,000*l.* to the said Dame Amelia Long, or her assigns, during the remainder of her life, commencing from the time when such her estate for ninety-nine years shall be so determined, and with the like powers and remedies for the recovery thereof when in arrear; and such annuity of 8,000*l.* shall be payable half-yearly, and clear of all deductions, on the same several days of payment, and be raisable under the trusts of the said term of ninety years in like manner as I have hereinbefore directed in respect of the said annuities of 4,000*l.*; the first payment of the said annuity of 8,000*l.* to be made on such of the said half-yearly days of payment as shall next happen after the commencement of the same annuity: Provided always, and I declare my will to be, that if the said John Hume, Lord Viscount Alford, shall die without having acquired the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, then and in such case the use and estate hereinbefore directed to be limited to the heirs male of his body shall cease and be absolutely void: and that if the Earldom of Brownlow shall descend and come to him, and he shall not have acquired, or shall not acquire, the title and dignity of Duke or Marquis of Bridgewater, to him and the heirs male of his body, before the end of five years next after he shall become Earl Brownlow, then and in such case the several uses and estates hereinbefore directed to be limited to the said John Hume, Lord Viscount Alford, and to trustees during his life for preserving contingent remainders, and to the heirs male of his body, shall thenceforth cease *and be absolutely void, and that my said hereditaments and real estates hereinbefore devised shall in either of the said cases thereupon go over and be enjoyed according to the subsequent uses and limitations declared and directed by this my will, as if the said John Hume, Lord Viscount Alford, were actually dead without issue male: Provided also, and I declare my will to be, that if it shall happen that the said John Hume, Lord Viscount Alford, shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, with the immediate limitation over of such title and dignity to the said Charles Henry Cust and the heirs male of his body, or to the heirs male of his body if he shall be dead leaving issue male, and

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also, that the said Charles Henry Cust shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, then and in such case the use and estate hereinbefore directed to be limited to the heirs male of the body of the said Charles Henry Cust shall cease and be absolutely void : and that if the Earldom of Brownlow shall descend and come to him the said Charles Henry Cust, and he shall not have acquired or shall not acquire the title and dignity of Duke or Marquis of Bridgewater to him and the heirs male of his body, before the end of five years next after he shall become Earl Brownlow, then and in such case the several uses and estates hereinbefore directed to be limited to the said Charles Henry Cust, and to trustees during his life for preserving contingent remainders, and to the heirs male of his body, shall thenceforth cease and be void ; and that in either of such cases my said hereditaments and real estates hereinbefore devised shall thereupon go over and be enjoyed according to the subsequent uses and limitations of this my will, as if the said Charles Henry Cust were actually dead without issue male : Provided also, and I declare my will *to be, that if my brother the said Francis Henry Egerton shall be created Duke or Marquis of Bridgewater, with such limitations over of the said title and dignity as that the same may, immediately after the failure of issue male of my said brother, come to the said John Hume, Lord Viscount Alford, and the heirs male of his body, and after them to the said Charles Henry Cust and the heirs male of his body ; then and in such case my said hereditaments and real estates hereinbefore devised shall be settled, limited, and enjoyed in such manner as if the several provisos hereinbefore expressed for the determination of the uses or estates directed to be limited to the said John Hume, Lord Viscount Alford, and Charles Henry Cust, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, subsequent to the proviso for taking and using the name and arms of Egerton only, had not been contained in this my will : Provided also, and I declare my will to be, that if the said John, Earl Brownlow, shall in case of the death and failure of issue male of my said brother, in his lifetime be created Duke or Marquis of Bridgewater, the said title and dignity being limited to him and the heirs male of his body by the said Sophia, Lady Brownlow, his late wife only, and not being inheritable by or limited to any other issue male of the said John, Earl Brownlow, the same shall be thenceforth equivalent

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to the acquisition of such title and dignity by the said John Hume, Lord Viscount Alford, to him and the heirs male of his body, with limitation over to the said Charles Henry Cust and the heirs male of his body; and my said hereditaments and real estates shall be settled and limited so as to go and be enjoyed thenceforth and for the future as if the several provisoes hereinbefore expressed for the determination of the several uses or estates directed to be limited to the said John Hume, Lord Viscount Alford, and to the said Charles *Henry Cust, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, subsequent to the proviso for taking and using the name and arms of Egerton only, had not been contained in this my will notwithstanding the previous determination, if it shall happen, of the uses or estates directed to be limited to the heirs male of the bodies of the said John Hume, Lord Viscount Alford, and Charles Henry Cust, under any of such several provisoes: Provided always, and I declare my will to be, that if the said John, Earl Brownlow, shall hereafter take any other title than Duke or Marquis of Bridgewater, so as to be inheritable by or limited to the issue male of his body by the said Sophia, Lady Brownlow, his late wife, or any of them, then and in such case the uses and estates hereinbefore declared and directed to be limited to the said John Hume, Lord Viscount Alford, and Charles Henry Cust, and to trustees during their lives for preserving contingent remainders, and to the heirs male of their bodies respectively, shall thenceforth cease and be void, and that thereupon my said hereditaments and real estate shall go over, and be limited and enjoyed according to this my will, as if the said John Hume, Lord Viscount Alford, and Charles Henry Cust were actually dead without issue male: Provided also, and I declare my will and intention to be, that my said hereditaments and real estates shall not be enjoyed by the said John Hume, Lord Viscount Alford, or the heirs male of his body, if he shall by any means whatsoever succeed to or take any title (other than Duke of Bridgewater) to which the Marquis of Bridgewater shall not, if then, or would not if thereafter to be created, be superior in rank, or have precedence being of the same rank, nor by the said Charles Henry Cust or the heirs male of his body, if he shall take any title either by immediate creation, limitation over, or otherwise, other than Duke of Bridgewater, *to which the Marquis of Bridgewater shall not, if then, or would not if thereafter to be created, be superior in rank, or take

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precedence if of the same rank; and that the uses and estates hereinbefore directed to be limited to such of them the said John Hume, Lord Viscount Alford, and Charles Henry Cust as shall take any such title contrary to this my will, and to trustees for his life to preserve contingent remainders, and to the heirs male of his body, shall thenceforth cease and be void; and thereupon my said hereditaments and real estates shall go over and be enjoyed according to the subsequent uses or limitations of this my will, as if he or they taking such other title contrary to this my will were actually dead without issue male." During the life of the testator's brother the trustees were to manage the devised estates. Each trustee, whether appointed by the will or by the Court of Chancery, was to receive 2,000*l.* a year for his trouble; and powers to cut timber and to grant leases were conferred. After giving to his brother a power to create a jointure, a similar power was given to each successive tenant for years or for life, or tenant in tail in possession, except that the estates were never to be subject to more than two jointures at a time. The will then proceeded thus: "Provided also, and I declare my will to be, that if the use or estate hereinbefore limited to the said John Hume, Lord Viscount Alford, for the term of ninety-nine years determinable as aforesaid, or the use or estate limited to the heirs male of his body as aforesaid, shall be determined and made void by virtue or according to any of the provisoes for that purpose hereinbefore contained, any jointure to be made or covenanted to be made by him as aforesaid, shall thenceforth cease and be void, and that if the use or estate hereinbefore limited to the said Charles Henry Cust for ninety-nine years determinable as aforesaid, or the use or estate hereinbefore limited to the heirs male of his body, shall be determined and made void by virtue or according to any of the provisoes for that purpose hereinbefore contained, any jointure to be made or covenanted to be made by him as aforesaid shall thenceforth cease and be void, and that any jointure which shall have been made or covenanted and agreed to be made by any person whose estate or interest shall be determined by reason of his refusing, neglecting, or discontinuing to use the name and arms of Egerton, or of his using any other surname or arms, or of his refusal or neglect to apply for the King's license or an Act of Parliament for that purpose, shall thenceforth cease and be absolutely void."

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In a codicil executed on the same day, there was a recommendation to Lord Alford, in case he should come into possession of the

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trust estates of the testator, to allow his brother C. H. Cust to enjoy the Brownlow estates: “And if the said Lord Viscount Alford shall become Duke or Marquis of Bridgewater, so that my estates shall be permanently settled on him and his male descendants, that he shall settle or concur in settling the said other estates to which he is now entitled as aforesaid upon his said younger brother and his male issue in a course of strict limitation; but I declare that this is to be understood as a recommendation only, and is not intended to be imposed upon him as an obligation, as otherwise his refusal to comply therewith might tend to defeat my object of uniting my estates to the title of Duke or Marquis of Bridgewater according to the limitations contained in my will, if it shall be the pleasure of the Crown to create such title so as to come to the heirs male of the said John, Earl Brownlow, and his issue male by the said Sophia his late wife.”

The testator died without issue on the 21st October, 1823, and without having revoked or altered his will.

[14] At the time of the testator's death, Lord Alford was in the twelfth year of his age.

On the death of the testator, the title of Earl of Bridgewater devolved upon his brother Francis Henry, eighth Earl of Bridgewater, who died on the 11th February, 1829, without having been married, and without having been created Duke or Marquis of Bridgewater. Upon his death, the Countess of Bridgewater, the widow of the testator, became entitled as tenant for life in possession to the real estates devised by the testator's will, and to the income of his residuary personal estate, and accordingly entered into the possession and enjoyment thereof, and so continued until the time of her death, which happened on the 11th of February, 1849.

Dame Amelia Long, who, before her death, had become Lady Farnborough, died on the 16th January, 1837, without leaving issue. Lady Farnborough and Sophia, Lady Brownlow (who was the mother of Lord Alford, and of the respondent Charles Henry Egerton, in the testator's will described as Charles Henry Cust), were sisters, and were the only children of Lady Amelia Hume, who was the only sister of the testator. On the decease of Lady Farnborough, Lord Alford became the heir-at-law of the testator.

Sir Charles Long, who had been created a Peer by the title of Lord Farnborough, died on the 18th January, 1838. Mr. Wilbraham Egerton was appointed a trustee in his place.

Edward Herbert, Earl of Powis, died on the 17th January, 1848, and John, Earl Brownlow, thereupon became the sole legal personal representative of the testator.

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By indentures dated the 7th and 8th July, 1848, the respondent Edward James, Earl of Powis, was appointed a *trustee of the testator's will in the place of Edward Herbert, Earl of Powis, and the real estate and residuary personal estate of the testator were then vested in John, Earl Brownlow, Wilbraham Egerton, and Edward James, Earl of Powis.

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On the death of Charlotte Catherine Anne, Countess of Bridgewater, on the 11th of February, 1849, Lord Alford became entitled in possession for the term of ninety-nine years, to be computed from the day next before the day of the death of the testator, if he Lord Alford should so long live, to the real estates, subject to the trusts of the testator's will and to the income of the residuary personal estate. Immediately after the death of the Countess of Bridgewater, Lord Alford obtained a license authorizing him to take and bear the surname and arms of Egerton, which he continued to use and bear till his death. His son, the appellant, has since obtained a similar license. A license was also granted to the respondent Charles Henry Cust, who thereon took the name and arms of Egerton.

Lord Alford, who, after the granting of the license to bear and use the surname and arms of Egerton only, was called John Hume Egerton, died on the 3rd January, 1851, and until his death continued in the possession and enjoyment of the real estates and of the income of the residuary personal estate of the testator. The income was stated to be above 60,000*l.* a year. The appellant is the eldest son and the heir male of the body of Lord Alford, and the heir-at-law of the testator.

There was not, at the time of the date of the testator's will or of his death, a Dukedom or Marquisate of Bridgewater, either in existence or in abeyance, and since the death of the testator it has not been the pleasure of the Crown to create any such Dukedom or Marquisate or any such title as Duke or Marquis of Bridgewater. Neither *the appellant nor John, Earl Brownlow, has, since the date of the will, taken any title whatever.

[*16]

On the 26th of February, 1851, the appellant filed his bill in the High Court of Chancery against the respondents, praying that it might be declared that he was, under and by virtue of the testator's will and codicils, equitable tenant in tail male in possession, of the

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estates, other than leaseholds for years, subject to the trusts of the will, and absolutely entitled to the estates held upon leases for years, and the personal chattels, subject to the trusts of the will, but as to such leaseholds for years, and personal chattels subject to the gift over in the will contained, in the event of a tenant in tail male by purchase dying under the age of twenty-one years without leaving issue male of his body then living: and further praying that the trustees might account for the rents, and a receiver be appointed, until it should have been ascertained whether the appellant, or Charles Henry Egerton, was the party entitled to the possession and receipt of the rents, issues, and profits of the same estates.

Charles Henry Egerton demurred to the bill for want of equity.

Similar demurrers were filed by John, Earl Brownlow, and Edward James, Earl of Powis, and by Wilbraham Egerton the elder, William Tatton Egerton, and Wilbraham Egerton his son. The demurrers were argued before Vice-Chancellor Lord Cranworth, and on the 20th of August, 1851, his Lordship delivered judgment over-
[*17] ruling all the demurrers (1). All the defendants afterwards *put in

(1) 1 Sim. N. S. 484—490. [On that occasion (after stating the will and the facts of the case) Lord CRANWORTH said:]

The plaintiff, in order to establish his right to the relief which he asks, must make out two propositions: first, that the condition defeating the limitation in favour of the heirs male of the body of Lord Alford is a condition subsequent; and, secondly, that it is a void condition, to which this Court will not give effect, as being either impossible or contrary to public policy. It is necessary for him to make out that the condition is a condition subsequent, for if it be a condition precedent, it is wholly immaterial whether the act, the doing of which constitutes the condition, be impossible or contrary to public policy, or even positively illegal. If a devise is made to take effect only on the happening of a particular event, then, unless the event happens, there is no gift, and all inquiry as to the character of the act on which the condition depends, is nugatory.

[Upon the first point his Lordship said that he was clearly of opinion that

the condition was a condition precedent and not a condition subsequent.

Upon the second point his Lordship expressed his opinion in favour of the legality of the condition on the ground that the condition would not affect the Crown in the free exercise of its prerogative of granting titles and that it must be presumed that the Crown would do what was right in such a matter without regard to any interest, collaterally affected, and that the condition was not void merely because it might induce the party to attempt by unlawful means to obtain what by the condition it was meant he should get by lawful means. On this point his Lordship said:]

On the whole, therefore, I am of opinion that the proviso carrying back the estate to the heirs male of the body of the late Lord Alford, in case Earl Brownlow should attain the dignity of Duke or Marquis of Bridgewater with the stipulated limitations, is a valid proviso; and so that the plaintiff, though he has no estate in possession, has yet an interest in seeing that a proper settlement is made, securing to

answers to the bill, and a replication having been filed and evidence gone into, the cause came on to be heard on *the 26th of February, 1852, before Lord Cranworth (V.-C.), acting for Vice-Chancellor Kindersley, under an order of *the LORD CHANCELLOR. LORD CRANWORTH by his decree dated that day, directed that the bill, so far as it prayed [a declaration in favour of the appellant's title and an order that John, Earl Brownlow, Wilbraham Egerton the elder and Edward James, Earl of Powis, might be decreed to account with the appellant for the rents, issues, and profits of the estates from the death of his father received by them, should stand dismissed out of Court]: and, Lord Alford having died without having acquired the title and dignity of Duke or Marquis of Bridgewater, to him and the heirs male of his body, and also without the Earldom of Brownlow having descended to him, and neither the testator's brother Francis Henry, Earl of Bridgewater, nor John, Earl Brownlow, having been created Duke or Marquis of Bridgewater, his Lordship declared that in the settlement in the decree directed to be made, no present use or estate in possession ought to be limited to the heirs male of Lord Alford in the testator's freehold and copyhold hereditaments, nor any corresponding estates and interests by such will created or directed to be created in the leasehold hereditaments and personal chattels in the testator's will bequeathed to go along with his freehold hereditaments; and his Lordship declared that, upon the decease of Lord Alford, the respondent Charles Henry Egerton became entitled under the will of the testator to the hereditaments and real estates devised by such will and the codicils thereto, except the parts thereof sold or conveyed in exchange since the testator's decease under the power in that behalf in his will contained, and to the estates purchased under the directions in that behalf in such will contained, and also to the leasehold hereditaments and personal chattels for the term of ninety-nine years, computed from the day next before the day of the him his right under that proviso. And I think that this bill is so framed as to entitle the plaintiff under the prayer for general relief to call on the Court to direct a proper settlement to be made according to the directions of the will, securing to him his possible interest in the event of Earl Brownlow becoming Duke or Marquis of Bridgewater. The result therefore is, that though on the death of Lord Alford the beneficial interest in the estates passed

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to the defendant Charles Henry Egerton for ninety-nine years, if he should so long live, subject to the proviso for defeating that estate, and so the plaintiff has no right to the specific relief which he asked for, yet he has a remote possibility of interest which prevents his bill from being demurrable: the demurrers, therefore, must be overruled, and there must be time to answer.

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testator's decease, if he, Charles Henry Egerton, should so long live, discharged from the jointure and term of years for securing the same respectively expressed to be limited by the indenture of the 5th of April, 1849, but subject to the proviso in the testator's will contained for the determination of the estates of Charles Henry Egerton ; and that Charles Henry Egerton was then entitled to the receipt of the *rents, issues, and profits of the freehold, copyhold, and leasehold hereditaments, and real estates, and to the possession and enjoyment of the personal chattels : and with the above declarations, his Lordship ordered that it should be referred to the Master to approve of a settlement. The appeal was brought against this decree.

The *Solicitor-General* (*Sir R. Bethell*) and *Sir F. Kelly* (*Mr. C. Hall* was with them), for the appellant :

There are two questions in this case. The first is, whether the contingency as to the estate created in favour of the issue male of the first taker is subject to and depends upon a condition precedent, that Lord Alford should, during his lifetime, acquire the title of Duke or Marquis of Bridgewater, or whether this is the more familiar case of an estate for the life of Lord Alford, with a contingent remainder in tail to his issue male, and with a proviso under which, on the happening of a subsequent event, that estate determines, and other estates in favour of other persons arise. If the latter construction is given to the will, then the second question that presents itself is, whether this proviso or condition subsequent is valid or void in law. The appellant contends that the proviso is a condition subsequent, and that it is void.

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As to the first question, the words of the proviso do not constitute a precedent condition at all, but form a mere ordinary proviso for the cesser of the estate, which had previously taken effect. They are words of cesser and determination, and not of creation. The other parts of the will show them to be so, and are wholly inconsistent with holding that the limitation to the heirs male of Lord Alford depended merely on his acquiring the title. The learning as to conditions is therefore inapplicable to the language of this will, which consists of nothing but a series of executory *directions to be abided by in making a future settlement of the property. This is a case of a trust in which the limitations of the estates are fully described by the testator, with

a view to the trustees carrying them into effect, and that which in the Court below was treated as a precedent condition is nothing more than a direction for the insertion of provisos for determining antecedent uses. When the language is that the occurrence of a particular event shall put an end to the estate, it is clear that in the mind of the writer of the will the estate must already be in existence. That is the language used here. A proviso for the cesser of the estate is of necessity to be treated as a proviso for the subsequent determination of the estate, and the form of the language used in the will must be looked to in order to determine whether the clause comes within that description.

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[Their further arguments and the cases cited by them are so fully dealt with in the judgments in the present case that it is unnecessary to set them out at length here, but it will be convenient to refer here to a case in point cited by them, viz., *Kingston v. Pierrepont* (1).]

Mr. Russell (with whom was *Mr. Giffard*), for the respondent, *Mr. C. H. Egerton*, [and *Mr. Rolt* (with whom was *Mr. Malins*), for the respondent, *Mr. W. Egerton*, junior, and for the parties in remainder on the determination of *Mr. C. H. Egerton's* estate, contended, first, that the particular proviso in question was in the nature of a condition precedent, so that no estate vested in the appellant; and, secondly, that the proviso was not open to objection on the ground of illegality, so that in any event it took effect to defeat the appellant's claim. Their arguments and the cases cited by them were considered and disposed of in the following judgments:]

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Sir F. Kelly, in reply.

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THE LORD CHANCELLOR :

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This is a very important case, and we have the advantage of the attendance of the Judges to assist us in its decision. I feel myself under some little difficulty, as the case was originally heard before

(1) 1 Vern. 5. As this case was constantly referred to, it may be convenient here to insert the whole of the report.—“The case was thus: Gearvase Pierepont devises by his will 10,000*l.* to procure ‘by all lawful means’ a dukedom to the head of his family, so that it be within a year after his decease, and a bill was exhibited to

have the money applied accordingly: but upon a demurrer it was adjudged against the plaintiff, as well for that it is illegal to acquire honour for money, as also for that the bill was not exhibited within due time, so as to attach the money in equity within the year.”

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me in the Court below, but I did not think it right on that account to avoid the duty of sitting in judgment on it here. My mind is perfectly open to conviction upon it, but that makes it peculiarly important that I should not say one word as to how far my opinion may have been affected by the argument at the Bar. The course I propose to adopt is simply to put to the Judges the questions to which I shall presently advert, in order to obtain their opinions as to the true construction of this will. The will devises certain estates to trustees, imposing on them the duty of making a settlement in a particular manner. In such a case the testator is sometimes what is called his own conveyancer, and directs what the settlement is to be, and the Court only carries his directions into effect. Sometimes the Court has to construe the will to find out the intention of the party, and then to frame the settlement according to that intention. It appeared to me that that was the case here. After the case had proceeded *some way in the Court below, I suggested to the counsel that this was purely a legal question and that I ought to stop further argument upon it, and send a case for the opinion of a court of law; but it was pressed on me that it was a case which must come to this House, and that, consequently, they were ready on both sides to take my decision at that moment. My indolence was tempted by the statement that I might decide the case either way, for that it was intended under any circumstances to be brought up here. I did not, however, think it consistent with my duty to act on that suggestion. I looked into the case carefully and decided it as if my decision was to govern its result. The case is now here, and the course I propose is, to state the will—the death of the Earl of Bridgewater; the fact that Lord Alford was then in his twelfth year; that the brother of the testator died in 1839 without acquiring the desired title; that the testator's widow entered and died; that then Lord Alford entered and complied with the clause as to the name and arms; that Lady Farnborough died without issue; that Lord Alford died in 1851, having previously married and leaving issue of that marriage, but not having obtained the required title; that on his death his brother, Mr. C. H. Cust, entered and complied with the condition as to the name and arms; and that the appellant here is the eldest son of Lord Alford and the heir-at-law of the testator. I then propose to ask the Judges these questions. (His Lordship then proposed questions, which were afterwards agreed to.)

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I wish to draw your Lordships' attention to the form of this will with reference to the questions now put to the Judges, taking care to avoid, as I ought, the expression of any opinion on this important case. The devise is to *trustees in fee in trust to convey to certain uses, but the testator has directed that the estates shall be conveyed to the uses of the trusts and subject to the provisos afterwards stated, and in the mean time the estates are to go to the uses and subject to the powers and provisos stated in the will. The will then tells what these uses are, and the first question is one which is not submitted to the Judges, as it is a question of equity, namely, whether that which we call the trust, is in this case a trust to be executed or is executory. I do not doubt that every trust directed to be performed is executory in a certain sense, because the estate is in the trustees, and they are to convey to the uses, but, beyond that, I submit this as a point not at all in doubt, that this is not an executory trust in the sense in which we employ that term in equity. The testator here has been his own conveyancer; he has provided in technical terms for every possible event for which he intended to provide, and for the creation of every estate which he intended to limit. There is not a single limitation made to depend on the will which a court of equity could not carry into effect under the directions therein contained. The testator has in fact not delegated to the Court any power, any discretionary power; he has used fit and proper words to describe every one of his intended limitations.

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The following questions to be put to the Judges were then agreed to.

"Taking the facts from the printed cases, but reading the will as if it were a devise to the uses therein mentioned, and not a devise to trustees to convey to those uses, the following questions are put to the Judges:

"1. On decease of Lord Alford, did his eldest son, the appellant, become entitled to any and what estate in the lands devised in remainder immediately expectant on the ninety-nine years term?

"2. If he did, is such estate liable to be defeated on any and what event or events, and may it or not come *in esse*, or revive again, on any and what event or events?

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"3. On the decease of Lord Alford, did his brother Charles Henry Egerton, the respondent, become entitled to any and what estate in remainder immediately expectant on the said term?

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"4. If he did, then is such estate liable to be defeated on the happening of any and what event or events?

"5. Are all or any and which of the several provisoes void?

"6. Are the provisoes or any and which of them to be treated as being conditions precedent?

"7. In the events which have happened, has the jointure appointed in favour of Lady Marianne Alford ceased?"

Lord Chief Baron POLLOCK, in the name of the Judges, requested time to consider these questions.

Ordered.

Aug. 1.

The House sat to receive the opinions of the Judges.

Lord Chief Baron Pollock (who came up from the Home circuit), and Mr. Justice Williams (the Judge who remained in town during the vacation) attended the House. No other Judge was present.

Lord TRURO said that if there was any difference of opinion among the Judges, so that one Judge could not deliver an opinion agreed to by the whole of them, it was most desirable that the House should have the advantage of hearing each of the learned Judges state his reasons for the opinion he had formed, and that this was especially desirable in a case like the present where there were various points for consideration, and where, therefore, no large majority of the Judges might agree as to some of the points.

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As there *were but two of the Judges now present, and it was understood that there was a difference of opinion among the Judges, he moved that the consideration of the case should be adjourned till the other Judges could attend.

The LORD CHANCELLOR entirely agreed with this proposal. When all the Judges agreed, there had been a custom for one to read the opinions of all; but when they differed, it was of importance that each Judge should give the precise view which he took of the subject, so that the House might not only know the conclusion at which he arrived, but the steps by which he arrived at it. The difficulty here had arisen from the fact that the case was argued just as the Judges were going on their circuits, and notwithstanding the urgency for the decision, it was impossible to put the public to the inconvenience of having the circuit delayed. It had since been suggested that their Lordships would allow the opinions of all the Judges to be stated by such of them as could attend, and for that purpose the Lord Chief Baron had now come up from the Home circuit; but this was a very unsatisfactory course, and would

not have been adopted but for the pressure of circumstances. Perhaps, as it was not now likely that the session would be over before the lapse of a fortnight, the further consideration of the case could be adjourned, and as some of the circuits would then be finished, many of the Judges would be able to attend.

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LORD BROUGHAM said it would be contrary to all precedent and practice to allow, in a case where the Judges differed, one Judge to read an opinion for one body of Judges, and another to read an opinion for the rest. The practice, which had in recent times grown up, of hearing one Judge read an opinion for all where they were unanimous, could not be extended and applied to a case where they differed.

LORD LYNDBURST fully agreed with his noble and learned friends.

LORD ST. LEONARDS concurred.

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The further consideration of the case was adjourned.

The Judges again attended, and delivered their opinions.

Aug. 12.

[The following nine Judges were of opinion that the particular proviso in question was in the nature of a condition precedent, and that there was no valid objection to that proviso on the ground of public policy or illegality, viz., CROMPTON, J., WILLIAMS, J., CRESSWELL, J., TALFOURD, J., WIGHTMAN, J., ERLE, J., ALDERSON, B., COLERIDGE, J., PARKE, B. On the other hand, PLATT, B., and the LORD CHIEF BARON were of opinion that the proviso could only operate (if at all) as a condition subsequent, but that it was in any case contrary to public policy, and was consequently void and wholly inoperative. It is not thought necessary or useful to reprint the whole of these opinions, but it may be found convenient to retain here some passages from the opinions of ALDERSON, B., and PARKE, B., on the question of the effect of "public policy" as invalidating the provisos relating to the acquisition of a title, and also to retain at length a considerable part of the opinion of the LORD CHIEF BARON, which dealt with and disposed of the conflicting opinions expressed by the majority of the Judges in support of the judgment of the LORD CHANCELLOR, which was reversed on this appeal.]

Referring to these provisos, ALDERSON, B., said:]

It is said that these provisos are illegal, and they may lead to public evil or inconvenience; that, in short, they are contrary to what is called public policy. I think this is a very grave and important question; if by public policy is meant the object and

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policy of a particular law, then I readily accept it as a rule, for it is a very reasonable mode of construing a particular law to look at the object with which it was framed, and the evil it was apparently intended to remove. Again, if a proviso be either illegal or impossible, no doubt it is void. But here it seems to be contended that an act, possible and legal, but in the opinion of sensible men not expedient to be done, is for that reason to be void as contrary to public policy. Now I think that this, which is really what is here meant, would altogether destroy the sound and true distinction between judicial and legislative functions; and I pray your Lordships to pause before you establish such a precedent as that. By this public policy will be meant the prevailing opinion, from time to time, of wise men (and in saying "of wise men" I give a favourable view of the principle) as to what is for the public good,—an excellent principle, no doubt, for legislators to adopt, but a most dangerous one for Judges. It is notorious that this would introduce an ever-shifting principle of decision, and that no case hereafter could be ever determined upon precedents, if it was to be adopted. A lease carefully drawn according to understood rules may be set aside as contrary to the policy of free trade, or a promise or contract between man and man set aside because, not its intention or object, but its possible tendency may, in the opinion of the day, lead to inconvenience. Why should such contracts be, as they constantly are—such as contracts with parish officers to supply goods to the parish workhouse—actually prohibited, if their tendency without such prohibition makes them void? It is impossible to *foresee where such a principle will stop. I shall not venture to take this, therefore, for my guide, nor go into political theories or instances from the history of our own country to decide on the validity of the Earl of Bridgewater's will. My duty is as a Judge to be governed by fixed rules and settled precedents.

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But what are the cases cited, and what is the true principle to be found in them? I propose to examine the first, that I may ascertain as well as I can the second. The first case, as being nearest to the present, is that of *The Earl of Kingston v. Pierrepont* (1); but there, by the will, a sum of money was expressly left for procuring, by all lawful means, the peerage. Now there are no lawful means of so procuring it; for it is, says the reporter, illegal to acquire honour for money; so that the devise was for an impossible purpose. And there, too, it was the very object,—not the

(1) 1 Vern. 5. See *ante*, p. 15.

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mere tendency, or supposed tendency, of the devise; and for that reason the devise was void. If the Earl of Bridgewater, now, had devised these estates expressly that their proceeds might be used to procure the marquissate, this case would have been decisive to show that the devise was void; but this is a totally different case. Then comes the case of the bastard child (1), where the agreement for payment of a sum once for all to churchwardens and overseers by the putative father was held to be illegal. But the true principle on which that case was decided was that to which I alluded before, that the policy of a law is to be looked at in construing it. The Bastardy Acts direct that the putative father shall indemnify the parish. "Indemnify" does not mean that the parish shall make a profit, but shall be saved from loss. Now the parish was to be indemnified only, and that because probably the Legislature contemplated those evils *which Lord ELLENBOROUGH and the other Judges so correctly point out. They decided, and gave as their reasons for holding the parish officers to a mere indemnity, those arguments of policy which induced, as they thought (and no doubt correctly), the Legislature to make the law. They used the policy of a particular law as a key to open its construction; and they did rightly. But that case is no authority for construing a man's act by disputable notions of an expedient or inexpedient policy, which is the case here.

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Next comes the class of cases arising out of wagers, which, in terms, approach more nearly, but, when properly considered, are not at all applicable (because their determination depends on very peculiar grounds) to the present case. Wagers are like the *sponsiones judicis* (2) of the Roman law; they are made between parties both of whom are volunteers, and they are not part of the disputes arising in the course of the common business of human life. Now the courts of law are not provided at the public expense, and were not intended by those who so provided them, for the settlement of any but differences which do arise in the ordinary course of business; and it is not at all wonderful, therefore, that disputes arising out of wagers, if tried at all, should be put under more stringent restraints than other disputes; and we find that it is so. Many wagers are illegal which as conditions would be legal. For instance, a wager as to the duration of her Majesty's life would be held illegal; but no one would object to the making a lease for lives in which her Majesty's life should be one. So, again, a wager that a son would

(1) *Cole v. Gower*, 6 East, 110.(2) [*Sic.* Probably the learned Baron wrote *judiciarie*.—F. P.]

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be born within a twelvemonth after the marriage of A. and B. would be illegal; but a sum of money or an estate left to the first son of that marriage if born within a year of the nuptials, would not be a void bequest or devise. The *cases of wagers are governed by special rules; and no doubt it has been laid down that wagers raising an indecent issue, or one with a Judge or juryman as to the result of a cause, or one with a voter as to the result of an election, or as to the probable amount of the revenue, or as to the duration of the life of a foreign Prince at war with this country, have been held illegal, as contrary to public policy. In the last case, that of *Gilbert v. Sykes* (1), this was pushed to a great length, almost amounting to the ridiculous, when it was gravely put that it might induce the reverend plaintiff there to commit high treason, by protecting the life of Napoleon in case of invasion, or induce Sir Mark Sykes, the defendant, to try to put an end to his payment by the assassination of that Prince. But even in that case it would have been difficult if the defendant had really sold to the plaintiff an annuity for the life of Napoleon, to have argued that it was a void transaction; and yet the imagined tendency would have been precisely the same in both cases. The truth is, that an active imagination may find a bad tendency arising out of every transaction between imperfect mortals; and to use this as a criterion for determination, would make every case depend on the arbitrary caprice of an acute Judge.

The principle, then, to be extracted from all this, seems to me to be, that in all the ordinary transactions of business or contract in human life, if the object expressed be impossible or illegal, the condition is void; and that if it be physically possible, but impossible except by doing an illegal act, it is void also. But that the mere tendency, on some remote and not very probable supposition, that what is not expressed to be the object may, nevertheless, possibly be considered to be the object, will not make the condition void.

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Is, then, this in the ordinary course of the business of human life? The fact that the Legislature passed a statute enabling a man to make a will of lands surely proves most abundantly that it was considered his business and his duty to do so; and as no restrictions were imposed, except as to the form of doing it, it must be taken that the Legislature meant him to do it freely and according to his own wish. It was probably thought that this power would conduce to the public good by making men prudent and active in acquiring an

estate which they were permitted to devise freely after their death. To make a will of lands is, then, surely part of the ordinary business of human life; it is not a capricious or wanton act, like a mere wager.

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Then it falls within those rules which govern such acts. I can find no ground for saying that it is illegal to leave land to a man on condition that on him the free grace and favour of the Crown, the proper rewarder of merit, shall be poured out. To me it seems quite as reasonable to consider it as an incentive to well-doing and to patriotic daring. Why am I, when it may be rightly and honourably obtained, to impute the intention of dishonour to the devisee, or of corruption to the Crown or its ministers?

For these reasons, I think this condition legal; and, indeed, as all the conditions are based on the same free grace and favour of the Crown, though there may be some distinctions taken and some difficulties raised as to one of them, I think all are legal.

[In the course of his opinion, PARKE, B., with reference to the appellants' contention that the provisoes or some of them were illegal as against public policy, said:]

This is a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean "political expedience," or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the Legislature to determine, what is the best for the public good, and to provide for it by proper enactments. It is the province of the Judge to expound the law only; the written from the statutes: the unwritten or common law from the decisions of our predecessors and of our existing courts, from text-writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have no doubt been founded upon the prevailing and just opinions of the public good; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised law, and we are

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therefore bound by them, but we are not thereby authorized to establish as law everything which we may think for the public good, and prohibit everything which we think otherwise. The term "public policy" may indeed be used only in the sense of the policy of the law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the *established law. If it can be shown that any provision is contrary to well-decided cases, or the principle of decided cases, and void by analogy to them, and within the same principle, the objection ought to prevail. But we are clearly of opinion that this cannot be shown here.

Primâ facie, all persons are free to dispose of their property according to their will and pleasure, and are free to make such contracts as they please, and are morally and legally bound by them, provided, in both cases, they adopt the formalities required by the common and statute law. We find, however, from the sources of information from which we derive our knowledge of the common law, that contracts have been deemed to be illegal and void in many cases; none of them, however, resembling the present. One great class of cases has been that of wagers. Courts have been anxious to discountenance all wagers in which the parties have had no interest, and been astute, even to an extent bordering upon the ridiculous, to find reasons for refusing to enforce them such; is the case of the wager in *Eltham v. Kingsman* (1).

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Others, with just reason, they have refused to enforce, where persons have voluntarily interfered in the affairs of another, and made wagers, the decision of which would affect his feelings or be outrages on decency. Such is the case of *Da Costa v. Jones* (2). The question of the sex of an individual could not be made the subject of a wager; but if it arose in the course of litigation with respect to the real rights of parties, for instance in suing for a legacy left to a male, the inquiry, however indelicate it might be, could not be avoided. In other cases of wagers, where the effect would be to make a man a Judge in his own cause,—such is the case of a wager laid by a Judge upon the event of a cause which he is to decide,—it would be against the *established rule "*nemo in propriâ causâ judex esse debet*" to allow him to acquire an interest in it: *Jones v. Randall* (3). In the case of *Gilbert v. Sykes* (4), the Court certainly went a great length in holding a wager to be void

(1) 19 R. R. 417 (1 B. & Ald. 687).

(3) Cowp. 37.

(2) Cowp. 729.

(4) 14 R. R. 327 (16 East, 150).

on the life of the late emperor of the French. I doubt much whether, if the matter were *res nova*, that case would be decided in the same way. But if this had not been the case of a wager, but of a policy by one who had an interest in the life of the late emperor of the French, would there be any question as to the right of the assured to recover after his death?

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There are other cases in which contracts or provisoes have been held to be illegal on principles long recognised by the common law; such as marriage-brokerage-bonds, conditions, or contracts not to marry, in restraint of trade, against alienation of land, including those violating the law of perpetuities; others have been forbidden upon principles long established in courts of equity, where a contract creates an interest at variance with a duty; all these rest upon established authority. Another referred to was that of *Cole v. Gower* (1), where a promissory note for a certain sum was given to parish officers to indemnify a parish against the expenses of the maintenance of an illegitimate child. The ground of that decision clearly was, that an agreement for a certain sum was against the provisions of the statute 6 Geo. II. c. 31, which only authorizes an indemnity. When public policy is there spoken of by the Judges, it must be understood to be spoken of in reference to the provisions of the statute. It is a statement of the probable reason for making the law, in order to show the true construction of the law made. It would not be contended, that a bond for a given sum upon a contract by the *obligee to support a man for his life would be void on the ground of public policy, as tending to the insecurity of life.

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In this present case, there is a total absence of precedent or authority. The case of *The Earl of Kingston v. Pierrepont* (2) being clearly distinguishable, as will be afterwards shown. Upon what grounds, then, is it to be said that the provisoes are illegal? It cannot be on the ground that the object is illegal; for the obtaining a title is a worthy and laudable object of ambition. It cannot be, that the means intended to be used are illegal; for that cannot be inferred from any one of the provisoes, or all taken together. Those provisoes show a great anxiety on the mind of the testator, that the title should be obtained, but that any improper means should be actually used does not appear on the face of the will, as it did in the case of *The Earl of Kingston v. Pierrepont*. Whether if it were pleaded in a form of action which required pleadings, that such was the real purpose of the bequest,

(1) 6 East, 110.

(2) 1 Vern. 5. See *ante*, p. 15.

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such a plea could be proved, is entirely beside the question which your Lordships propose. No inference whatever can lawfully be made on the face of the will, that such illegal means were really contemplated, and the presumption always is in favour of legality until the contrary appears. If it could be shown that illegal means would be used, or that the probability of their being used was so great that the testator must have actually contemplated and intended the use of them, I should agree that the proviso was tainted with illegality; but nothing approaching to such a case appears.

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It is argued then that the provisoes are illegal by reason of their tending to cause the use of illegal means, though no intention to use them existed in point of fact. That a *person might be tempted to use illegal means to obtain a title in consequence of such a proviso, is not sufficient. Nor can we justly reason from the magnitude of the estate: some minds would be as much influenced by the prospect of gaining 100*l.* as 100,000*l.* The greatness of the sum to be gained by the compliance with the proviso might be some evidence, if the question of fact were properly raised as to the real intention of the party making the will, but as a ground of avoiding it on legal principles, the magnitude of the sum appears to me immaterial. Where a wager or a contract is void according to the established rules of law, as a wager with a Judge as to the event of a cause, or a contract in restraint of marriage, or the like, the sum contracted for signifies nothing. As to the tendency to use corrupt means, can any one say that they were the most probable to be used to accomplish the end? Honourable means may accomplish it, and upon what legal principle are we to presume that they will not be more likely to prevail? Are we to presume that the evil principle would in Lord Alford prevail over the good, and that he would be more prone to attempt to advance his interest by corrupt and dishonest means than by those which are worthy and laudable? Are we to assume that the advisers of the Crown would be more prone to yield to suggestions of a corrupt than of a pure and honourable character? It would be indecent to admit the supposition that corruption can prevail for such a purpose.

This supposed tendency to evil would apply to other cases as well as to those which are political. Suppose a large estate left to A., subject to the condition of his becoming senior wrangler and senior medallist at Cambridge. Would it be illegal, as tending to

induce him to employ the money in corrupting the examiners, or betraying into idleness and profligacy, or destroying his most promising *competitors? If a large estate is left to a man conditioned that he should within a stated time marry a countess, would it be void, as tending to induce him to use improper means to effect such an alliance? Or if an estate was to be forfeited in case the devisee did not take holy orders, or become a Dean or a Bishop, or take a degree of doctor of divinity in a certain time, would it be void, as having a tendency to induce him to obtain those orders, dignities, or distinctions by bad means? So the case of a condition to obtain the royal license to use a particular name and arms, a most common occurrence, might on similar grounds be impeached, as having a tendency to cause the royal license to be obtained by corrupt means. So even also the clause, in the form in this will, which is to use "the utmost endeavours to obtain it," might be said to have a similar though a more remote tendency to the same end; and yet to object to either of such clauses, on either ground, seems to be utterly untenable. Nay, a limitation to one for life, remainder to another, might be said to be void, as having a tendency to cause the remainder-man to try to kill the tenant for life; a limitation to first and other sons successively in tail, to induce the second son to destroy the life of the elder by a direct act of murder, or a continued course of cruelty and unkindness, or to use fraudulent artifices to prevent him from marrying. Insurances on lives might be avoided on the same ground. Insurances of property against fire, contracts by burial-clubs to pay sums of money for the funeral of wives or children; in short, there are few contracts in which a suspicious mind might not find a tendency to produce evil; and to hold all such contracts to be void would, indeed, be an intolerable mischief.

Many similar instances might be put in which the adoption of this principle would lead to the most dangerous consequences to the freedom of disposition by a testator, and *to the obligation of contracts and conveyances *inter vivos*. The great principle of the law has been to leave both entirely free. The only case at all bearing upon the question of obtaining a peerage is that of *The Earl of Kingston v. Pierrepont* (1) already cited; but it differs in this essential particular, that there the money claimed was bequeathed for the express purpose of being applied in obtaining a dukedom, and differs as much from the present, as a gift to A. on

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condition of his taking holy orders would differ from a bequest of money to be applied in obtaining holy orders, which would no doubt be illegal.

Another objection is, that these provisions are illegal, because they tend to embarrass the Crown in the exercise of its prerogative. We are bound to assume that the Crown, in the exercise of its grace and favour, will be guided solely by constitutional considerations, by regard to merit, loyalty, and public services; and we cannot imagine anything more illegal in that which is said to be a difficulty in the way of a free exercise of the prerogative, than in rival applications for the same office or the same title. If a man during his life were to apply to the Sovereign to grant a peerage to A., and offer if it were done to endow its holder with an ample fortune, no authority has been quoted or argument adduced, to show that he would be acting illegally or corruptly; and yet in principle we cannot distinguish such a case from the present.

I think, then, that all the first six provisoes are good, and not void on any ground, and that in every case to which they apply as conditions subsequent, the limitation would be defeated by non-compliance with them.

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The seventh and eighth provisoes are impeached upon another ground, viz., that it is the duty of every subject to obey the summons of the Crown to Parliament, and that he *is bound to take his place in Parliament as a Peer, and by any title that the Crown may choose to bestow upon him. This is a very refined objection; nevertheless, if well founded, it ought to prevail; but we think it is not well founded. As to Lord Brownlow, he being already a Peer of Parliament, and bound to attend to advise the Crown in that character, I do not think that he is bound by his duty of allegiance to attend Parliament by another title or accept a fresh patent; and no authority can be found in support of such a position. The seventh proviso, therefore, is not illegal, as encouraging the violation of this duty of a subject.

The eighth is said to be objectionable on the ground that it provides that if Lord Alford or Mr. Charles Henry Cust, both commoners, or the heirs male of his body, shall take any title other than that of Duke of Bridgewater, to which the Marquis of Bridgewater shall not if then, or could not if thereafter to be, created, be superior in rank, or have precedence, being of the same rank, then the uses limited to them shall be void. The other parts as to succeeding to a title are unobjectionable.

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It is argued that these, being commoners, would be bound, not only to obey the summons of the Crown, but to obey it by whatever title the Crown chose to give him in the writ. That a commoner is bound to appear to the writ of summons must probably be conceded, although in *Lord Abergavenny's* case (1), it is said that the person to whom it was addressed might have excused himself or waived it and submitted to fine. But we conceive that there was an obligation in point of law to obey, and the fine was only a means of enforcing it; and therefore a condition subsequent to defeat an estate might be illegal on the ground that it was a condition to disobey the King's writ. But I think *that this condition is not illegal. There is no authority that I am aware of, that a subject may have a writ directed to him by any name by which he is not previously known, or which he does not choose voluntarily to adopt, nor any authority that he is bound to accept a patent of nobility which he is not willing to accept by a name which he does not choose to adopt. Therefore we are of opinion that the last of these conditions is not illegal on the ground that it is a condition to disobey the lawful mandate of the King.

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We also think, that as all these eight conditions are separate from each other, one may be void without affecting the validity of the others; and though if an invalid condition subsequent should occur, the limitation would not be defeated, that would not prevent a valid condition subsequent from operating to defeat the limitation.

It is said that all these provisos have one object, and show the testator's intention to accomplish it. But the object is lawful. The anxiety of the testator to accomplish it by so many stringent provisions might be made some evidence of the real intention of the testator to use improper means, but it would be evidence only; and if that intent had been averred, and could be proved to have been in fact that corrupt means should be used, all would be void; but on the face of the will no such intention can be seen, and to infer it would be to act upon mere loose suspicion, without any legal ground whatever, and contrary to the usual rule,—that legality, not illegality, is to be presumed until the contrary is proved.

THE LORD CHIEF BARON:

In dealing with the seven questions proposed by your Lordships to the Judges, it appears to me to be the more convenient course to answer them, not in the order assigned to them by your Lordships,

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but to take in the first place *the sixth question and then the fifth ; as it appears to me that upon these all the rest depend, and these are the questions that have been principally argued at your Lordships' Bar. I propose, therefore, to consider the sixth question first, which is,—“Are the provisoes, or any and which of them, to be treated as being conditions precedent?” The only provisoes as to which any doubt can be entertained, and to which any argument has been directed, are those which relate to the acquiring or acceptance of a peerage, and especially those which declare the will of the testator to be, that in certain events the uses and estates limited to the heirs male of the body of Lord Alford in the first instance, and then, secondly, of Charles Henry Cust, shall “cease and determine;” and to these provisoes alone the following remarks are intended to apply.

This, my Lords, is purely a legal question, turning on the true construction of the will, on the intention of the testator, and the effect to be given to that intention if it can be discovered, and it involves some of the most obscure and difficult and doubtful matters connected with our judicial system.

The original maxims of the law of real property were extremely simple and clear, but various causes, chiefly perhaps a continued struggle on the part of judges to adapt it to the growing exigencies of society, and a few Acts of Parliament intended to improve it, have elaborated it into an extremely refined and artificial system, in the administration of which there has been recorded more difference of opinion among eminent and enlightened judges than in any other branch of our law. I allude to such cases as that of *The Duke of Norfolk*, where the CHANCELLOR was of one opinion and the three Chiefs of the common law Courts of an opposite opinion. The succeeding CHANCELLOR overruled the judgment of his predecessor, and finally, this House affirmed *it. Many similar examples may be found. But giving to the subject the best consideration in my power, I am of opinion that the proviso (that the uses and estates limited to the heirs male of the body of Lord Alford, in the events stated in the will, shall cease and determine) ought to be treated as being a condition subsequent, not precedent, and for the following reasons:

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1st. I think the devise to Lord Alford and the heirs male of his body ought to be considered and treated in this instrument as one devise, one remainder, one entire disposition of the property in favour of one branch of the testator's family; and this devise having taken effect by Lord Alford having been actually in

possession, whatever defeats this disposition of the property in favour of Lord Alford and the heirs male of his body, must operate by way of condition subsequent.

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It is very true, that Lord Alford did not take any freehold estate (he took merely a chattel interest); it is also true that the heir male of his body would (on his death) take not by descent, but as a purchaser; but these are artificial and technical results of the arrangements introduced into the will, not to defeat but to protect and insure the testator's object, which was, that (subject to the proviso) the estate should really go to Lord Alford and the heirs male of his body. That was manifestly his general intent, which intent (in giving effect to the language of the will) ought to govern our construction of it; and I think to take a different course would be really to use, as a means of destroying and defeating the testator's intention, those technical arrangements which he introduced and intended for its preservation.

No doubt, for technical reasons, the heir male of the body, although so called—so designated, does not take as heir, but as a purchaser; but the testator cared nothing *about him individually; his intention was, in substance, to give the estate to Lord Alford for life, by giving him a chattel interest (that would in all human probability last longer than his life), and giving it to him for the whole period, if he should so long live, and then to the heirs male of his body, by way of contingent remainder; the general intention therefore is to give it to Lord Alford for life, and afterwards to the heirs male of his body. Such a disposition of the property in a will ought in my judgment to be considered and treated (whatever may be the form of it) as one remainder to Lord Alford and the heirs male of his body; that is, as one remainder to that branch of the testator's family.

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In the second place, I think this proviso is to be treated as being a condition subsequent, because it is manifest that the testator intended it should be so treated. It is on all hands agreed, that whatever may be the form of language used, the intention of the testator in such a case is to prevail. Now the proviso is first alluded to and mentioned at the end of the devise to Lord Alford and the heirs male of his body, and to Charles Henry Cust and the heirs male of his body; and it is thus described—"Subject nevertheless, as to the several uses and estates so to be limited to the said John Hume, Lord Viscount Alford, and Charles Henry Cust, and to the trustees during their respective lives, and to the heirs male of their

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respective bodies, to the several provisos for the determination thereof hereinafter contained." In this case, therefore, the form (the language used) is manifestly that of a condition subsequent. Perhaps, strictly speaking, it is not a condition at all, for no estate arises, accrues, or is enlarged on its performance. It is really what it professes to be, "a proviso for the cesser of a certain use or estate" in a certain event; and, it may be, that all the learning about conditions, and the rules that *govern their construction, are wholly inapplicable to this case; but I am now merely on the question of the testator's intention. If this had been meant to operate as a condition precedent, nothing would have been more easy than so to have expressed it. The will is framed with the greatest care, obviously by a person of the highest skill in the conveying branch of the profession, and he has framed the proviso in terms which seem to have been studiously adopted, in order that there should be no doubt of his meaning.

In certain, cases, such as, if Lord Alford had become Earl Brownlow, and had not (within five years of his becoming Earl Brownlow) acquired the title and dignity of Duke or Marquis of Bridgewater, the proviso must have operated (if at all) as a condition subsequent; and there is not the least ground for arguing or even supposing that the testator meant the same form of words to operate differently in different cases, but quite the contrary,—that he meant them to operate in the same way in all cases. As, therefore, in one case, which was distinctly foreseen and provided for (viz. Lord Alford's surviving his father for more than five years, and not obtaining the requisite title), the condition must have operated (if at all) as a condition subsequent, it is most reasonable to infer that the testator intended it to operate in every instance and on every occasion in the same way as a condition subsequent. By the same identical form of language and expression he must be understood to have meant the same identical thing.

With a view to throw some further light on the intention of the testator, I would here observe, that it is highly probable that some doubt was entertained as to the lawfulness of the proviso, and that the will was prepared and the proviso framed in the present form expressly with reference to that doubt. If the proviso was void and Lord Alford became Earl Brownlow, and so continued for five years *without obtaining the title, the proviso would operate, if at all, as a condition subsequent; but if void, it would be inoperative, and would be gone for ever,—it could not affect any estates arising after;

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but in the events that have occurred, if it is now to operate as a condition precedent, the estate and interest intended for Lord Alford and the heirs male of his body will be defeated and the estate will go over. Now in a will so carefully prepared, and about which so much skill has been exercised, it is difficult not to believe that this must have been and was foreseen, and that it could not have been intended that the benefit to Lord Alford and the heirs male of his body (assuming the proviso to be void) should depend upon the contingency whether Lord Alford survived Lord Brownlow more than five years, or whether he died (as has happened) before Lord Brownlow. I am therefore induced to think that, to guard against this, the proviso has been cautiously put into the clearest, plainest, and most unmistakeable form as a condition subsequent, to operate as a cesser and not as a condition precedent, and that it is an unauthorized violence to the language of the will and of the proviso to treat this as a condition precedent, and that no refinement of legal reasoning can make a testator say and mean the very contrary of that which he has taken the greatest pains to express that he does not (1) mean, and will not say. If therefore the intention of the testator is to prevail, it appears to me to be quite clear that it was his intention that this should operate as a condition subsequent, and not as a condition precedent, and therefore it ought not to be treated as a condition precedent.

But, thirdly, reading the proviso itself and reading that part of the will where it is first mentioned, and upon which it was intended to operate, it appears to me that there is no necessity to do any violence to the testator's language, *and that there were "uses and estates" on which the proviso might operate as a condition subsequent. The testator says, certain uses and estates shall be subject to the several provisos for the determination thereof; and there are uses and estates which may be made to cease and determine, and upon which the proviso may operate as a condition subsequent. An estate may be in possession, or it may be in remainder and vested, or it may be in remainder and not vested, but only contingent; but a contingent remainder is as much an estate as an estate in possession; and if it were not, the testator has so called it, and pointed out distinctly what he means, and upon what the proviso is to operate, (viz. on the uses and estates limited to Lord Alford and Charles Henry Cust, and to the heirs male of their respective bodies), and he has expressly stated in what manner the proviso is to operate, viz. by making those estates cease and determine.

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(1) *Sic.*

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It is true the estate or use to the "heirs male of the body" could not be a vested estate till the death of Lord Alford, and it is equally true that the individual who would take it was uncertain till that event happened, because *nemo est hæres viventis*; but the estate existed, and (had been) created by the will, ready to be taken by the heir male, when he should be ascertained, and this is the estate which the testator says shall cease or determine. But I understand it to be said by my learned brothers who take a different view of the subject, that the estate did not exist: I apprehend this is not correct; the estate did exist, was expressly created by the will, but was made subject to the proviso. Had, indeed, the coming into existence of the contingent remainder depended on the acquisition of the title (which might have been the case had its creation or origin depended on the proviso), the case would have been different; and this appears to me to be the fundamental error, the fallacy of the opposing argument, viz. confounding together two things totally different, because they may have the same practical result; it is like confounding an estate for 1,000 years (if the party should so long live) with a freehold interest for life, because the effect and the result would probably be the same.

My Lords, in my judgment there is a real and essential difference between making a contingent remainder come into existence upon the acquisition of the title, and creating it by the will as a distinct substantive "estate and use," but making it subject to a proviso that it shall cease and determine if the title be not acquired. In the one case the estate never exists at all till the title is acquired, in the other it does exist, but ceases and determines upon the failure to acquire the title within the prescribed period. This is what the testator has expressed; and why should it be said that he did not mean it; nay more, that he cannot by law mean it, and must not and shall not be permitted to mean it, and that whether he meant it or no, some technical reasoning is to put a construction upon his words to make the proviso operate as a condition precedent (all the authorities agreeing that, whatever the expressions may be, the intention is to prevail). For these reasons:

1st. That this was one remainder only to Lord Alford and (contingently) to the heirs male of his body, which remainder had taken effect by the possession of Lord Alford.

2nd. That on examining the language and the whole frame and structure of the will, it is manifest the provisoes were intended to operate as conditions subsequent.

3rd. That even if the contingent remainder is regarded alone, without reference to Lord Alford's estate, making with it only one remainder, there was an estate and use for the proviso to operate on, and to cause to cease and determine.

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For these reasons, my Lords, I answer the sixth *question, that the provisos are not to be treated as being conditions precedent, but as being conditions subsequent.

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I shall now proceed to state my opinion on the fifth question, which is: "Are all, or any, and which of the several provisos void?" The only provisos which have been made the subject of any doubt or controversy, and which, therefore, alone are necessary to be noticed, are those which relate to the acquisition or non-acquisition of certain peerages, and especially of the title and dignity of Duke or Marquis of Bridgewater by Lord Alford or by Charles Henry Cust; and the question is, whether it is competent to the owner of an estate to create, by deed or by will, one or more contingent remainders, or conditional limitations, which shall depend upon the exercise of the Royal prerogative in creating a peerage in a particular family, with a particular title, and with prescribed limitations.

There is no direct authority for saying that this can or cannot be done. On the immediate point there is no direct decision either way. The absence of any authority may be accounted for by the fact that this is the first attempt to create such a condition since the peerage has existed. In the case of *The Earl of Kingston v. Pierrepont* (1), the testator gave 10,000*l.* to be employed in procuring a dukedom, and the gift was held void. That case is not decisive of the present, but it involves principles common to both. In considering this question, I think nothing turns upon the use of the word "acquired." I think no importance can be attached, or special meaning be ascribed to that word; it is not worse than the word "obtain," but it is not better than the word "procure," which occurred in the case just mentioned. I think it means, if he shall die *without becoming Duke or Marquis of Bridgewater; the testator having left him an immense landed estate to enable him to acquire or obtain or procure the title in question, with the ominous condition, that if he did not get it, he himself should in one event, and his family in another, lose the estate; and the question is, is this a lawful condition to annex to an estate? It is perfectly clear and certain (as a principle of law) that if this condition be against the

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(1) 1 Vern. 5. See *ante*, p. 15.

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public good, it is void. This is distinctly laid down in Sheppard's Touchstone, chapter six, where among other conditions which are contrary "to law" or "against the liberty of the law," a condition is also pronounced to be void which is "against the public good;" and the learned writer must have meant something other than and different from "contrary to law." So Lord Coke (1), in treating of conditions which are void as "against law" (though they concern not anything that is *malum in se*), mentions those that are against some maxim or rule of law, and those which are "repugnant to the State," which I take to be, in effect, the same as the expression in Sheppard's Touchstone of "against the public good." Here, also, it is clear the writer meant something different from, and not included in the expression, "against some maxim or rule of law." The authority referred to in the margin of Coke is Bracton (2): the passage is, "Ac si quis rem promitteret quæ in rerum naturâ non esset, vel esse non posset, vel si rem sacram vel publicam, quæ non est in alicujus bonis."

I think, therefore, I am bound to lay down this principle as a clear and undoubted maxim of law, that if this condition be "against the public good" (the expression in Sheppard's Touchstone), if it be "repugnant to the State" (the expression in Coke), it is void.

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This narrows the inquiry to this point: "Is it against the public good that such a condition should be created and enforced?" and this is what your Lordships have to decide.

Let me here (before I proceed further) point out distinctly and nakedly what is the effect of the condition, and the relation in which it places the members of the testator's family.

A nobleman seeing his title about to become extinct, and desirous of reviving it in the female line, but with a higher grade in the peerage, leaves his immense wealth to one branch of his family, subject to a forfeiture of the estate, if the title be not acquired within certain periods. It is then to go over to a second branch in the same line, and they are to try what they can do to accomplish the testator's object in getting the peerage in question into his family, and if they also fail, they are to forfeit the estate, and it is to go over to a more distant branch. So that while one branch of the family has a strong pecuniary interest to get or acquire the peerage, other branches have a strong pecuniary interest to oppose and prevent it, in order that they may benefit by the forfeiture; and this is not the accidental result of

(1) Co. Lit. 200, b.

(2) Book. III. fol. 100.

circumstances arising in the ordinary course of events, but is specially and gratuitously occasioned by the mere caprice and will of the testator. Now, in order to ascertain whether this condition be valid or not, I propose to consider whether any conditions can be suggested which would be deemed void by the common consent of all statesmen, lawyers, and persons of intelligence, and to examine on what grounds such conditions are void or would be deemed so, and to see if any general maxim or principle can be collected or extracted, which will be of general application, and to ascertain whether the present case is within that principle.

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In those periods of our history when the succession to the Crown was disputed, would it have been deemed competent to a subject (would he have been permitted) to make the course of succession to his estate to depend on the succession to the Crown, and to turn upon the predominance of the House of York or Lancaster, and especially would it have been permitted if the condition or limitation had been introduced for the avowed object of supporting one or other of the contending parties? But I propose to put three distinct cases: 1st. During the Commonwealth could a staunch republican have left his estate to his heir, or to some devisee, subject to a proviso that in the event of the restoration of the monarchy it should go to some college, hospital, or public charity, and especially if he avowed that his object was to give his heir or devisee an interest in supporting the anti-monarchical government? 2ndly. In the reign of Charles II. could a zealous Protestant have introduced a similar condition, based on the passing of the Exclusion Bill, and on the Duke of York not ascending the throne? 3rdly. In the reign of Anne, could a sincere Roman Catholic have framed a similar condition founded on the repeal of the Act of Settlement within a given period? And, on the restoration of monarchy in the first case, on the ascent to the throne of James Duke of York in the second case, and on the non-repeal of the Act of Settlement in the third case, would our courts of law (including this High Court of Parliament) have enforced these conditions, or would they have declared them void, and left the heirs or devisees in the enjoyment of the estates? Cases of this sort may be multiplied indefinitely from various periods of our history, during the wars of the Roses, and during the reign of Henry VIII. and some subsequent reigns when the succession to the Crown was uncertain.

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Having proposed the above questions with respect to the succession to the Crown, I would next inquire whether a condition could be

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made to depend upon the whole Legislature adopting or rejecting some particular line of policy on which depended, or might depend, the safety, or the honour, or the welfare of the kingdom. Could the form of government, the mode of representation, the established religion of the country, questions of toleration, whether Roman Catholics should be relieved, or Jews admitted to Parliament, or the Test Act be established, or repealed? could any of these be made the foundation of a condition, and with the avowed object of effecting or assisting the views of the donor or testator on the matter which formed the basis of the condition? So,—not unnecessarily to multiply instances, but to come to more recent times,—when the Reform Bill had been once rejected by the Upper House, and was a second time about to be sent up by the Commons, could such a condition (as has been already referred to) have been made to depend upon, whether the Crown would create (not one Peer) but a large number of Peers, with a view to assist in passing the measure of reform, and whether ultimately it would receive the assent of the Crown? In all, or most of these cases, I should expect all statesmen, and a very large majority of all lawyers (if not absolutely all), and most persons of intelligence acquainted with our Constitution, would concur in the opinion that such conditions were contrary to sound policy, were against the public good, dangerous to the public safety, and therefore were void.

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I now propose to examine how far “public policy,” or the “good of the State,” has been recognised as a ground of decision with reference to covenants, contracts, and other matters; but before I do that, I am desirous of pointing out to your Lordships the difference in this respect *between a condition and a covenant or contract. Lord Coke lays it down, that conditions are not to be favoured; and in *Machel v. Dunton* (1) it was laid down by the whole Court, “that a condition is a thing odious in law;” and this *dictum* is copied into all our text-writers and law-treatises; and the reason is obvious, because a condition interferes with the absolute vesting of the estate, which the law always favours, and it controls the ownership; it seeks to exercise a dominion over the property after the death of the donor; it opposes the will (possibly the caprice) of the dead to the *jus disponendi* of the living. The law, therefore, while it encourages commerce and favours contracts, deems a condition odious, and looks at it with jealousy. The owner of an estate may himself do many things which he could not (by a condition) compel

(1) 2 Leon. 33; Owen, 54—92; and see Cro. Eliz. 288, and Poph. 8.

his successor to do. One example is sufficient. He may leave his land uncultivated, but he cannot by a condition compel his successor to do so. The law does not interfere with the owner and compel him to cultivate his land, (though it be for the public good that land should be cultivated) so far the law respects ownership; but when, by a condition, he attempts to compel his successor to do what is against the public good, the law steps in, and pronounces the condition void, and allows the devisee to enjoy the estate free from the condition.

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I advert to this, to establish the position that whatever is bad as a covenant, or contract, must be bad as a condition *à fortiori*.

This doctrine of the public good or the public safety, or what is sometimes called "public policy," being the foundation of law, is supported by decisions in every branch of the law; and an unlimited number of cases may be cited as directly and distinctly deciding upon contracts and covenants on the avowed broad ground of the public *good, and on that alone; and the name and authority of nearly all the great lawyers (whose decisions and opinions have been extensively reported) will be found associated with this doctrine in some shape or other. It is distinctly laid down by Coke (1), "*nihil quod est inconveniens est licitum*."

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It is above a hundred years ago that Lord HARDWICKE, in *The Earl of Chesterfield v. Janssen* (2), thus expressed himself in giving judgment, alluding to marriage-brokers' bonds: "The Court relieves for the sake of the public as a general mischief." May I venture to ask your Lordships whether peerage-brokers' bonds would be entitled to greater favour?

[His Lordship, after referring to several other cases upon public policy, continued as follows:]

My Lords, after all these authorities, am I not justified in saying that, were I to discard the public welfare from my consideration, I should abdicate the functions of my office—I should shrink from the discharge of my duty? I think I am not permitted merely to follow the particular decisions of those who have had the courage to decide before me, but in a new and unprecedented case to be afraid of imitating their example. I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise.

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The conclusions to which I have arrived, from the decided cases

(1) 66 a.

(2) 1 Atk. 352.

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and the principles they involve, are, that all matters relating to the public welfare—all acts of the Legislature or the executive—must be decided and determined *upon their own merits only ; and that it is against the public interest (and therefore not lawful) for any one officiously, wantonly, and capriciously, without any motive but his own will, to create any pecuniary interest or other bias of any sort in the decision of a matter of a public nature, and which involves the public welfare, the party creating that interest having no special and particular individual interest in the subject-matter with which he intermeddles. My Lords, in the case of wagers and contracts this has been repeatedly and solemnly decided by all the Courts (and the case of conditions is an *à fortiori* case). It is no doubt some restraint upon the freedom of human action, and some limit to the contracts a man may make and to the mode in which he may use or dispose of his property, but (as far as wagers are concerned) it was (before the late Act of Parliament) the clear, settled, established law of the land, vouched by the decisions of every Court in Westminster Hall, spread over a period of upwards of a century ; and the Judges who have concurred in these decisions include every illustrious name that has adorned the profession of the law during that time. In principle I cannot find any distinction between a wager during life and a condition annexed to a legacy or devise to take effect after death : the mischief of both is precisely the same. If there be any distinction in respect of the right to dispose of property, it ought rather (as it seems to me) to be in favour of the right of the owner to dispose of it as he pleases while alive ; but I think there is no distinction, and I am of opinion that, according to the law of England, the owner of property cannot make any matter the subject of a condition to operate after his death which he could not have made the subject of a contract or a wager during his life ; I think no man can leave his property clogged and conditioned by his own personal *views of public affairs, or by his posthumous ambition (if I may so call it) ; he cannot make his political opinions run (like a covenant) with his land ; he may leave it to whom he pleases, but it must be unfettered by any condition bearing upon matters connected with the public welfare, as to which he must leave those who come after him to decide, and to act upon their own view of the merits of any public question, unfettered by any condition which may create a motive or exercise an influence that would disturb a judgment that ought to be founded on the public good alone.

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My Lords, it may be that Judges are no better able to discern what is for the public good than other experienced and enlightened members of the community ; but that is no reason for their refusing to entertain the question, and declining to decide upon it. Is it, or is it not, a part of our common law, that in a new and unprecedented case, where the mere caprice of a testator is to be weighed against the public good, the public good should prevail ? In my judgment, it is. Whether the public good is really concerned in this condition, and the principle which it involves, is the question for the consideration of your Lordships ; and your Lordships will have to decide whether or not it be mischievous to the community at large that every branch of the public service, civil and military, every department of the State, should be besieged by persons who, at the peril of losing their estates, are making every effort to obtain offices for which they may be unfit, and to procure titles and distinctions of which they may be unworthy ; that no man should be able to accept or decline public service without searching the wills at Doctors Commons to see whether he may not thereby call into action some condition precedent or subsequent which may ruin himself or some very near relation ; that an able statesman or a victorious *general should (in some period of great emergency) have to choose whether he will save his country and lose his estate, or save his estate by declining the public service ; and finally (in addition to the present complicated system of conveyancing) that the real and ultimate ownership of a large portion of the landed property of the kingdom should remain in abeyance till it appeared whether one member of a family would become a Bishop, another member of another family a common law or equity Judge, who should (thirty years hence) have the custody of the Great or Privy Seal ; or, whether the members of the learned professions in London should one day have the privilege of returning members to Parliament, and whether the young gentleman now at school should become one of such members, and afterwards a Peer of the realm. My Lords, I am not sure that some limit may not be discovered to the fanciful vagaries and capricious conditions with which property may be bequeathed, though it touch not the public interest ; but the moment conditions (in this case a series of conditions) are introduced, which in principle have a strong tendency opposed to the public welfare, the common law, which favours not conditions, but deems them odious, is strong enough to stay the evil and repress the mischief ; and in a perfectly new case (a case altogether *primæ*

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impressionis) I think the Judges are bound to hold fast to the principles of the common law, to remember the maxim *salus reipublicæ suprema lex*, and if the condition be really in principle against the public good, to pronounce it in their judgment void.

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It only remains for me (on this point) to inquire whether this particular condition, the obtaining a peerage by Lord Alford within a limited period, is a condition which falls within the principle I have endeavoured to establish; and I am of opinion that it is. A Peer, in addition to being a *member of one branch of the Legislature, is an hereditary counsellor of the Crown, and one of the Judges of the highest court of judicature in the realm. The framer of this will seems to have thought of nothing but the title and dignity of a Peer, and to have overlooked his important duties, and the interest which the public have in the correct discharge of them; he seems to have considered the peerage as merely giving a high position in the table of precedence, as being a bauble, the subject of bargain or barter, contract or condition, and to have forgotten that a Peer is at once a legislator and an expounder of the statutes, that it is his office to frame and also to decide upon the law, and that he has, in the Constitution of this country, duties to perform of the greatest importance to the public welfare. The creation of a Peer is an exercise of one of the prerogatives of the Crown, which the Crown possesses, like all other prerogatives, for the good of the country, and which ought to be exercised solely with reference to the public welfare, and the merits of the individual to be promoted, and the cause or occasion of his promotion. It was the object (no one could have doubted it if it had not been avowed, but it was the avowed object) of the testator by this condition to endeavour to obtain a renewal of the peerage in his family, which he foresaw would expire with himself or his brother; he endeavoured to create a strong pecuniary interest to procure a peerage, and he did so that the peerage might be got; he knew the influence that great wealth and large possessions exercise in the affairs of the world, and he took his chance whether they would be well or ill employed, so that they were successfully employed in accomplishing his end and aim, or, as he expressed it himself in his own language, in the codicil of the 31st March, 1823, “my object of uniting my estates to the title of Duke or Marquis of Bridgewater.” With this view he created this *strong, powerful, and dangerous pecuniary interest to obtain the peerage—an interest which might very possibly lead to unworthy attempts to obtain it.

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He prescribed the end, and he furnished the means, and he set no limit or bounds to the use of them; and it is impossible, I think, to doubt that he intended this condition to operate upon the mind of the Sovereign, or the minds of those who advise the Sovereign (and expected it would or might do so), to grant the peerage by reason or on account of the conditions, and from motives other than those which alone ought to operate, viz., the public good, and the merits of the individual to be promoted, and the cause of his promotion. I am of opinion that it was not competent to the testator so to deal with his property; that it is quite inconsistent with the public welfare, and even the public safety, that property should be bequeathed subject to conditions unnecessarily, capriciously, wantonly, and officiously introduced, and made to depend on any public act of State, whether the Crown, the Legislature, or any branch of it, or of the executive government; and I am therefore clearly and undoubtedly of opinion that this condition is unlawful and void.

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I shall detain your Lordships but a moment while I state my answers to the other questions:

1st. On the decease of Lord Alford, his eldest son, in my opinion, became entitled to an estate tail male in possession.

2nd. I am of opinion, that such estate is not liable to be defeated. I think all the clauses in the will relating to the acquisition or the acceptance or non-acceptance of a peerage are void.

3rd. On the decease of Lord Alford, his brother Charles Henry Egerton took no estate in possession, but (expectant on the failure of the heirs male of the body of Lord *Alford) he took the residue of the term if he should so long live.

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4th. I am of opinion that such estate is not liable to be defeated by the acceptance or non-acquisition of any peerage by any one.

The 5th and 6th I have already answered. As to the 7th, I am of opinion that in the events that have happened the jointure appointed in favour of Lady Marianne Alford has not ceased.

LORD LYNDHURST:

Aug. 19.

My Lords, I have read and considered with attention the opinions of the learned Judges in this case, and, after weighing the reasons upon which they are founded, I am constrained to say, though with much deference, that I differ from the conclusions of the majority of those learned persons. It is to be regretted that several of the opinions (as stated on a former day)

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were prepared during the pressure of the circuit, and without sufficient opportunity of consulting the authorities bearing upon the different, and in some respects, intricate points which the subject involves. But though I regret this circumstance, it was, I have reason to believe, unavoidable.

Two questions have been raised: first, whether the proviso respecting the title of Marquis or Duke of Bridgewater is a condition precedent or subsequent; and, secondly, whether the proviso is valid, or is to be regarded as against public policy, and therefore void.

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As to the first and more technical question, it is I think admitted, and cannot indeed be disputed, that the will has been drawn with much care and attention, by a person obviously well acquainted with the force and effect of the *terms he employed, and not likely, therefore, to have misapplied them. The testator declares his will to be that, if Lord Alford shall die without having acquired the title of Duke or Marquis of Bridgewater "to him and the heirs male of his body, then and in such case the use and estate therein-before directed to be limited to the heirs male of his body, shall cease and be absolutely void." These are admitted to be, in point of construction, and according to the constant usage of conveyancers, words importing a condition subsequent. The same words are uniformly used in different parts of the will as denoting conditions subsequent, and in cases where no other interpretation can be put upon them. In no instance are they used to express a condition precedent. In the previous passage of the will, the limitation of the uses and estates to Lord Alford and Henry Cust, and to the trustees during their respective lives, and to the heirs male of their respective bodies, is declared to be "subject to the provisos for the determination thereof therein-after contained;" and the use of the distinct word "determination" as to all these uses and estates indiscriminately, manifestly shows that the testator intended the conditions contained in those provisos to be, as to all of them, conditions subsequent. In like manner, in the proviso respecting the testator's brother being created Duke or Marquis of Bridgewater, the testator speaks of the proviso for the determination of the use or estate directed to be limited to the heirs male of the body of Lord Alford; and so also in the proviso immediately following relative to Earl Brownlow. It is further to be observed, that in the very clause in question, the condition is admitted to be a condition subsequent as to one

part of it, although it is contended to be a condition precedent as to the other part. In a case of necessity, indeed, such a difference of interpretation in the same clause might be adopted, but a very *strong case must be made out to justify such a departure from the ordinary rules of construction. The testator declares that the use or estate limited to the heirs male of the body of Lord Alford, shall, in a certain event, cease and be absolutely void—words which, even in their ordinary acceptation, and without reference to any technical rule, denote exclusively a condition subsequent. The proviso has nothing of the character of a condition precedent. It is not said that upon the occurrence of such an event a use or estate shall arise, but that if such an event shall not have occurred, a use or estate previously limited shall be defeated. It does not create—it determines and destroys. The will, in fact, consists of a series of limitations in favour of different persons and sets of persons, and the obvious meaning as to the point in question is, that if Lord Alford shall die without having acquired either of the suggested titles, the particular limitation in the series created in favour of the heirs male of his body, shall cease and be void—the limitation is in effect to be struck out of the series and the next limitation in favour of Henry Cust is to be advanced—but then it is upon a condition, which, if invalid, can have no operation.

But, my Lords, it is said, and not improperly said, that whether a condition is to be construed as precedent or subsequent must depend on the intention of the testator to be collected from the whole instrument; that no particular form of words is absolutely necessary to express the one condition or the other, and that the most strict technical words or form may bend to the clear and manifest intention of the testator. But far from the intention of the testator, to which I shall presently advert, being at variance with the terms used, according to their natural and legal construction, it appears to me that the case is just the reverse. The fallacy, if I may so speak, which has led to the forcible *conversion of the words importing a condition subsequent in this case into a condition precedent, seems to be this, namely, that a condition subsequent is not properly applicable to the limitation of a contingent use or estate. But such a use or estate is an interest recognised by the law, and not unfrequently of great value; and there is no more inconsistency in making it subject to a condition subsequent, by declaring that if a certain event shall not have occurred, the limitation shall determine or cease and be void, than if it were an

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interest vested or in possession. If the law allows such a limitation to be made, such an interest to be created, it follows, as of course, that it may be vacated or determined. It is clear that the framer of the will considered it as no objection to the effect of a condition subsequent, that the use or estate limited was contingent, since he expressly provided that the use or estate in this instance, which he must have known to be contingent, should, upon the failure of a certain event, cease and determine.

It is also, my Lords, to be observed, that in the clause respecting the name and arms the testator declares that if the person entitled, &c. shall refuse to take, or shall discontinue to use the name and arms of Egerton, &c., all such estates as shall be limited to the sons of such person in tail male, as for the time being shall be in contingency or suspense, as the case may happen, shall "cease, determine, and be void;" thereby expressly stating that a use or estate, which is described in terms as being in contingency, shall cease and be void. And here I may remind your Lordships that one of the learned Judges, though his opinion in the result is unfavourable to the appellant, Mr. Baron ALDERSON, after adverting to the words "shall cease and be absolutely void," observes "that they must be allowed to be very strong words, indicative of an intention on the part of the *testator that the heirs male of the body of Lord Alford should in some way or other first take the estate, and, on the contingency occurring, lose that which they had before taken; and, in such a case, the words would be to be treated as a condition subsequent."

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Then with respect to the intention of the testator, as it is to be collected from the whole of the will. Did he intend that the condition should not operate as a condition subsequent, according to the plain and obvious meaning of the words (for this is what is contended), but, on the contrary, as a condition precedent? He was not *inops consilii*, and we cannot assume that he did not know the effect of the terms that he used. Then how would they operate? If the testator considered, as I think it reasonable to conclude he did, that the proviso was legal and binding, his intention would be equally effected whether the condition was precedent or subsequent, and it would, therefore, not be necessary, upon this supposition, and in order to effect that intention, to do the violence which is attempted to the language and form of the condition. If he was mistaken in this respect, that is no reason for altering the plain words which he has used, and introducing other terms in order to

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give effect to what may be conjectured as to the disposition he might have made of his property had he been aware of the legal obstruction to the execution of his wishes. If we are to indulge in what I must consider as misplaced conjecture, I should think it not reasonable to suppose that he would, if the object he had in view could not be legally accomplished, and by no failure or default of those whom he intended to benefit in the first instance, desire that the estate should go over and be enjoyed by those who were the more remote objects of his bounty. For the same reason, if the testator entertained a doubt as to the legality of the proviso, it is not unreasonable to suppose that he would, as *the safer course, have made the condition a condition subsequent rather than a condition precedent. There appears to me then to be no sufficient reason, founded upon any supposed intention of the testator, to do violence to the words that have been used, and that they should therefore be interpreted according to their plain technical as well as ordinary sense, that is, as denoting a condition subsequent.

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The second point to be considered is, whether the proviso is at variance with public policy, for if so, and the condition is a condition subsequent, then the result will be the same as if no such proviso had been contained in the will; but otherwise if the condition be a condition precedent. This is not a technical question, but must be considered on general principles, with reference to the practical effect of the condition, and we must bring our observation and experience to bear in determining it.

It is a well-established rule of law that a condition against the public good, or public policy, as it is usually called, is illegal and void. Sheppard's Touchstone and Lord Coke are direct authorities on this point. In more modern times we find Lord HARDWICKE, in a case already cited by the LORD CHIEF BARON, stating that "political arguments, in the fullest sense of the word, as they concern the government of a nation, must be, and always have been, of great weight in the consideration of the Court; and though there may be no *dolus malus* in contracts as to other persons, yet if the rest of mankind are concerned as well as the parties, it may properly be said that it regards the public utility." And in another case he says, "These reasons of public benefit and utility weigh greatly with me, and are a principal ingredient in my present opinion."

It is unnecessary to cite other authorities in support of this

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well-established rule of law. What cases come within *the rule must be decided as they successively occur. Each case must be determined according to its own circumstances. When the case of a trustee dealing with his cestui que trust was first considered, it must, in the absence of precedent, have been determined upon weighing the public mischief that would arise from giving a sanction to such dealing. So as to transactions between attorneys and their clients; also as to seamen insuring their wages, and other similar cases, referred to in the course of the argument. The inquiry must, in each instance, where no former precedent had occurred, have been into the tendency of the act to interfere with the general interest. The rule, then, is clear. Whether the particular case comes within the rule, it is the province of the Court in each instance, acting with due caution, to determine.

My Lords, the duties incident to the peerage (and Lord Alford might at any moment, by the death of Lord Brownlow, have become a Peer) are of the gravest and highest character; and in the proper discharge of them the interests of the Crown and the public are deeply concerned. These duties are both legislative and judicial; in addition to which, a Peer of the realm has a right, when he deems it necessary, to demand an audience of the Sovereign, and to tender his advice respecting public affairs. In the framing of laws it is his duty to act according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, and least of all by those of a pecuniary nature. He acts judicially, not merely in the appellate jurisdiction of the House, but also in the various matters usually referred to Committees, in which the strictest independence is to be observed, and all foreign influence of every description to be carefully avoided. Such is the position and such are the duties of a Peer of the realm, and it follows that any application or *disposition of property which has a tendency to interfere with the proper and faithful discharge of these duties must be at variance with the public good, and consequently illegal and void. It is true that creations of Peers and promotions in the peerage emanate from the Crown, and the respect we entertain for the Sovereign will not allow us to suppose that, in the exercise of this, or any other prerogative, he can act otherwise than according to the best and purest motives. But we all know that practically this power is exercised according to the advice of the minister; that the Crown rarely exercises it, except at his suggestion and on his

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recommendation; and further, that these honours are usually granted, except in cases of extraordinary merit or distinguished public services, to the partisans and supporters of the Administration for the time being, and seldom to its opponents. This is obvious to all, and confirmed by every day's experience. What, then, would be the practical result of this state of things with reference to the proviso now under consideration? If an estate, in this case of great extent and value, is made to depend upon a creation or promotion in the peerage, is it reasonable to suppose, speaking generally (for we must so consider the subject, and without reference to particular individuals), that such a state of things would not have at least a tendency to lead the party thus interested to act, and without much inquiry, in accordance with those who could insure the permanence of the estate to his descendants; to induce him to support their opinions and measures without any very scrutinizing regard as to their effect or propriety; and thus to affect that free agency which it is a duty, as far as possible, to keep unimpaired? That there may be exceptions, honourable exceptions, to such an influence, I do not mean to doubt. There may also be individuals who, from the dread of being supposed to be *swayed by such motives, might adopt the opposite course, which would also be liable to objection. But, taking mankind as we find it, we could not, without wilfully closing our eyes and discarding all the results of our observations and experience, come to the conclusion that such a position would not have a tendency, and, in some cases at least, a strong tendency, to produce the result which I have stated, viz. to fetter the free agency of the party in the performance of the important duties incident to his position as a member of the peerage; and it follows, I think, that a proviso or condition which has a tendency to produce such results must be at variance with the public good and general welfare. It is admitted, that any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void. The character of the Judge, however upright and pure, does not vary the case. No less strong must be the principle when applied to the important duties of legislation, and to those judicial duties of the peerage upon which so many and such vast interests depend.

In the decision already adverted to, as to the insurance of the wages of a seaman, the only principle upon which it proceeded was, that such a practice, if permitted, would tend to relax his

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exertions for the safety of the ship, and thus affect the proper performance of his duty, in the faithful and active discharge of which the public interest is concerned; and so in other instances which have been mentioned, and to which it is not necessary more particularly to refer. Each case must, as I have already stated, be decided upon its own circumstances, as applied to the established rule of law regarding the public interest and welfare, or, to use the words already quoted of Lord HARDWICKE, "upon political arguments in the fullest sense of the word, as they concern the government *of a nation." It is true, and cannot be disguised, that other motives, such as love of power, eagerness for office, &c., may, and undoubtedly do, more or less, influence the conduct of men in the performance of these various and important duties. But if cases exist which are beyond the reach of the law, they afford no reason why, when a further influence is attempted to be created by an unusual disposition of property, and courts of justice are called upon to give effect to such disposition, they should not refuse it their sanction. The question, then, is, whether a proviso such as we are considering would have, if acted upon, a tendency to influence improperly the performance of those duties to which I have referred. I think it would have such a tendency; and I consider it, therefore, to be against the public good, and consequently illegal and void. Other objections, some of them of a more refined nature, may be urged against this proviso; but I am not disposed to enter into further detail, as there are several noble Lords present of great learning and experience, who have given much of their attention to this case, and are prepared to state their opinions upon it.

For the reasons, then, which I have thus given, I think, but not without some hesitation, considering the respect due to those learned persons from whom I have the misfortune to differ, that the judgment in this case cannot be sustained.

LORD BROUGHAM:

My Lords, the conclusion at which I have arrived, but not without some hesitation, from the respect which I entertain for the opinions of the learned Judges with whom I have the misfortune to differ, is, that the judgment cannot be sustained.

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The decision of this case must depend upon two points—*the effect of the proviso respecting the dignity, and the legality of that proviso. If the proviso makes the acquiring of the dignity a

condition precedent to the estate tail in remainder, that remainder never could arise, and the legality of the proviso is immaterial. If the proviso only avoids, or makes to cease, the estate tail, in any way created or existing, then this estate is only destroyed if the proviso is legal.

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1. It appears quite impossible to doubt what the frame of this proviso is, what were the intentions of the testator, and what were the pains taken by the well-skilled conveyancer who drew the will, to give those intentions expression and effect. The remainder is to the use of the heirs male of Lord Alford's body,—not, if he shall, or provided that he shall, or in case he shall, acquire the dignity, but without any such condition or contingency. Then follows a general declaration or provision subjecting the uses and estates so limited to Lord Alford and the heirs male of his body to “the several provisos for the determination thereof hereinafter contained.” So that the remainder having first been given without any condition, is subjected to a proviso for its determination, that proviso being afterwards inserted.

I observe some unwillingness to regard this proviso as properly a condition, whether precedent or subsequent, and it is said to be only in popular language a condition. I, however, incline to think that it comes properly enough within the description of a condition. It is a condition imposed upon Lord Alford—he is to acquire the dignity, and the impossibility of his doing so, were it admitted to the fullest extent, would not make it the less a condition. A gift to A. for life, remainder to B. if A. shall go to Rome in three hours, would prevent the remainder from ever vesting or even existing, and would so operate as a condition precedent. It is, however, of no consequence to *the present argument,—to the point I am now dealing with, whether we take it as a condition or as a circumstance, or event, or generally as a contingency. It may be of more importance as to the other question, that of legality, though I shall take it only as a contingency, which it clearly is, whether a condition or not.

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The use or estate, then, which had been limited without any words of condition or any words importing contingency at all, is declared to be subject to the proviso, not for annexing a condition or contingency to the use or estate coming into existence, but for working a “determination” of that use or estate; and then we have the proviso just referred to on the decease of Lord Alford without having acquired the dignity, “the use and estate hereinbefore

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directed to be limited to the heirs male of his body" (and as I am now dealing with it not as executory, I will leave out the executory words), "the use and estate hereinbefore limited shall cease and be absolutely void." The proviso thus answers, and most exactly answers, the description given of it in the preceding clause in which it is referred to prospectively, the clause which subjects the uses and estates before limited to the after-mentioned proviso. It is most truly a "proviso for the determination thereof." So, when, in the jointuring clause, the proviso is retrospectively referred to, the same expression is used; the uses are said to have been "determined and made void by virtue or according to the provisos." If it be contended that the words, although denoting cesser, avoidance, destruction, may possibly mean also, prevention, preclusion, causing non-existence as well as destroying existence, we may then look to the other provisos, if any can be found, in which the same expressions are used, where there is only one possible sense imputable to them—and accordingly, we find this occurs twice over. If Lord Alford shall become Earl Brownlow, and shall *not within five years acquire the dukedom or marquissate, all uses limited to him, to trustees to preserve contingent remainders, and to the heirs male of his body, "shall thereafter" (that is, at the end of five years) "cease and be absolutely void, and the real estates go over as if he were actually dead without issue male." Now this is clearly, and without any possibility of question, a cesser, a defeasance of a particular estate vested in possession, and of a remainder expectant on its determination, and no doubt whatever can arise that here the words import a condition subsequent. So the power of jointuring is given, and if Lord Alford at any time during his life shall execute it, the jointure so made, or covenanted to be made by him, shall "cease and be void if the uses and estates shall be determined and made void by the aforesaid proviso;" the jointure is "thenceforth to cease and be void," that is, from and after the determination and avoidance of the uses and estates limited to Lord Alford, and of the estate tail to his issue. It is quite undeniable, therefore, that, in these two provisos, condition precedent is out of the question; there is a condition subsequent only. The estate to Lord Alford, and the remainder to the heirs male of his body in the one, the jointure given to his widow in the other, are to cease by his not having acquired the dignity—to cease, by the one proviso, after his own estate had become vested in possession, and, by the other, after he had executed the jointuring power.

It is said, indeed, that the condition may be subsequent as regards the one limitation, and precedent as regards the other; and for this somewhat violent construction the reason is alleged that the proviso was so framed as to meet either of the two contingencies, the death of Lord Alford without having acquired the title, and his becoming Lord Bridgewater and not obtaining it in five years; and this, it *is said, explains and justifies the use of the words, that is, their use in both cases. But really, this is not so; for the part of the proviso which relates to Lord Alford's decease, might have been framed in words importing a condition precedent, so that no such use or estate should be limited to the heirs male of his body, instead of a direction that it should cease and be absolutely void; and then the use and estate both to himself and his issue male would have been directed to cease and be void from and after the five years. Indeed, it is quite plain that the two provisos are separate and independent; they refer to different estates, the one to the estate tail, the other both to the estate of Lord Alford and the estate tail; they relate to different periods, the one to the death of Lord Alford, the other to the expiration of five years from his succeeding his father; and the word "thenceforth," which only refers to the last antecedent, "end of five years," has no application to the former part of the proviso, which is complete in itself. The concluding part as to the estates going over, applies to both; and accordingly it says "in either of the said cases," so as to leave no doubt of the deliberate intention of the framer of this will.

Then must it be said that there is no estate existing to which the words of cesser can apply? The limitation to Lord Alford with remainder to his issue male as purchasers, may possibly be regarded as an entire limitation, and taking effect in Lord Alford's life, so that the condition subsequent could operate upon it. Without denying that this is a possible view of the matter, it may be said that we are not driven to it in order to give the proviso the effect which it plainly was framed to have, as contemplating a contingency that should determine an existing estate. For there would, independent of Lord Alford's estate, be an existing remainder, contingent indeed, and in two ways contingent, *both contingent during the particular estate and subject to the further contingency of the dignity not being acquired; a contingency which, if operating by way of condition precedent prevents the remainder from arising; if operating by way of condition subsequent destroys that remainder, or causes it to cease.

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The difficulty arises from the negative nature of the condition. If it had been a remainder expectant on the determination of the estate and to cease and be void if Lord Alford obtained a certain dignity, there could have been no doubt or difficulty about it. But even the consideration that the estate should cease the instant of its coming into existence does not appear to import anything absurd or self-repugnant. It is not nearly so refined as the possibility of a seisin supposed in the well-known case of *Dillon v. Freine* (1), in order to serve contingent and non-existing uses, and the suppositions made in some other cases in order to avoid greater absurdities or contradictions. The momentary nature or duration of the estate may possibly be viewed as the result, the consequence, of regarding the condition as subsequent. I fully admit the nicety of the point. "We have an estate destroyed the moment it arises," say the supporters of the judgment below. "But there had been a contingent remainder in existence before," say the objectors to that judgment. It may further be granted, that we look in vain for cases in which this precise point has been considered.

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On the other hand it must be admitted that if we are not at liberty to treat this as such a condition, no expression of the testator's intentions could have been sufficient to make it so considered. The same objection might have been urged even if he had said in terms, "I direct this to be taken as a condition subsequent and not as a condition precedent," in "the same manner as he has superfluously intimated his will respecting the suspension of estates in the heirs male during the existence of the life estates. So that we are driven to admit that this must be a condition subsequent, unless there is a rule of law to prevent it so being, which will hardly be contended.

I have been treating this as a limitation of uses, as the learned Judges have been directed of course to regard it, and not a devise to trustees to convey to such uses. But having clearly ascertained the intention, I apprehend we are bound so to deal with the settlement, so to direct it being made, as will give that ascertained intention effect. If this can only be done by giving some estate on which the condition subsequent can operate, then we must give such estate, as indeed certain of the Judges appear to have thought—one, more doubtingly; another, plainly and explicitly. Nor do I find that any one of those learned persons has a doubt upon the plain import of the words employed by the testator. None of them

(1) 1 Co. Rep. 113 b.

appears to doubt that he intended a condition subsequent, although most of them consider that, from such estate not existing, his words must be construed differently from his meaning.

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My Lords, it is quite unnecessary to speculate upon the grounds of the testator's intention. It has been suggested that he may have said, "If I have a right to stimulate Lord Alford and thereby obtain the junction of the dignity with the property, I do so; if I have no such right, then I shall not desire to exclude my nearest relations." But it is not safe to indulge in such suppositions; it seems by no means called for in this case; and they may be open to objections derived from the frame of the will.

I also pass over the somewhat extraordinary results which might follow from the proviso in case it should be deemed legal and effectual. Thus the possession of the *estates might have been vested in one branch of the family for a great length of time in case Lord Alford had died, leaving a son, five or six years after the testator's decease, and without the dignity, so that the devises over might have taken effect; but after twenty or thirty years, Lord Brownlow obtaining the dignity, the estates would have reverted to the issue of Lord Alford. Such consequences might follow whatever view we took of the condition, though more likely to follow from that condition being regarded as precedent. No such consequences can follow if it be considered as both subsequent and illegal. We are therefore brought to consider the second question, which only becomes material upon our deciding the first in favour of the condition being subsequent.

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2. The proviso is, that if Lord Alford shall not acquire the dignity in his lifetime, the estates shall pass from the heirs male of his body immediately on his decease; and that if he, having succeeded to the earldom of Brownlow, shall not acquire the dignity within five years, the estates shall pass from himself as well as from his heirs. The creation of Lord Brownlow, the father, as Duke or Marquis, with limitations to the heirs male of his marriage with the testator's niece, is declared to be equivalent to the acquiring the dignity by Lord Alford.

It is very possible that if the expression had been, not "acquire," but "be created," in the main proviso, the same consideration would have been applicable, knowing, as we do, the manner in which dignities may be conferred, in which they sometimes have been, always may be, conferred. But we are to regard the precise expression used, and by it plainly is intended the obtaining—Lord

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Alford obtaining by his own exertions. If the testator had been asked whether he did not contemplate Lord Alford becoming a Duke or Marquis, either through the public services of his father, *thereby exalted, or through his own services in after-life, he would in all likelihood have thought the question designed to turn him into ridicule. He would probably have thus regarded any suggestion, that, by leading an exemplary life, by strictly performing all the duties of his station, the father or son might find himself raised in the peerage without further or more active efforts to aid his ascent. No one can seriously believe that the testator contemplated such a rise; that he had in his view anything but a strenuous exertion to reach the desired height; that he attached the forfeiture of the estate to anything but the want of exertion or the want of success, and rather to the former than the latter kind of failure.

And here, my Lords, I lay out of view the arguments urged, powerfully and not inappropriately urged, on the tendency of such conditions and family arrangements to interfere with the free exercise of the prerogative. My view is pointed in another direction. I look towards their manifest tendency to cause corrupt proceedings, to encourage attempts upon the virtue of one class of public servants, to lay snares for the integrity of another class. The Crown, indeed, must be presumed, not merely, as my noble and learned friend has said, from dutiful respect towards the Sovereign—I will not consent to rest it upon that ground—the Crown is, in law, by *præsumptio juris et de jure*, incapable of being affected by any improper influence, a presumption of law which is not to be rebutted or averred against. That the Crown is the fountain of honour, and the Sovereign incapable of giving a wrong direction to its streams, is an undeniable principle of the Constitution, an undoubted position of law. But there is another, quite as irrefragable, which supersedes it and precludes its application to the present question. The Sovereign can only act by the advice and through the instrumentality of those who are neither infallible

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*nor impeccable,—answerable indeed for all that the irresponsible Sovereign may do, but liable to err through undue influence, and to be swayed by improper motives. The proviso gives Lord Alford the strongest inducement to use the means of unduly influencing the dispensers of Royal favour, and the will places those means at his disposal in an ample measure. A revenue of sixty thousand a year and upwards depends upon his obtaining the dignity; and that

large income may be employed, with the influence of his rank and station to boot, in furthering the attainment of this end.

In these times, no one will contend that the coarse form of naked bribery would probably be resorted to; but suppose the will had borne the date of 1678, instead of 1823, will any one pretend that the same improbability would have existed? Will any one affirm that the very persons from whom some illustrious members of this House descend, would have withheld their influence over, I will not say the Sovereign, but the ministers of the day, towards raising the devisee to the rank which their own progeny had attained; or would have spurned a gift of much less than sixty thousand pounds to propitiate that influence? If I go back half a century more than is necessary, it is because of a decided case at the earlier period; I might have stopped at 1723, and suggested that the possibility would even then have been anything rather than remote, of a skilful application of great resources obtaining a considerable advancement in the peerage, through certain favourites better known than respected. In those days—possibly of the first George, certainly of the second Charles—this would have been considered as within the bounds of no remote possibility. But surely it can hardly be maintained that the condition which would, on this ground, have been held illegal then, has become lawful now, in consequence of a change in the degree of *probability that it might lead to corruption. The tendency is alone to be considered, and unless the possibility is so remote as to justify us in affirming that there is no tendency at all, the point is conceded. Gifts, bequests, conditions, contracts, are illegal from their tendency to promote unlawful acts, without regard to the amount of the inducement held out, or interest created, the position of the parties, or any other circumstances which go to affect the probability of the unlawful act being done.

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As I cannot regard the argument on improbability in this case, so neither can I the suggestion that such conditions may have respect either to lawful or unlawful proceedings, and that we are to presume that lawful only are contemplated. Suppose even that it had been said, "acquire the dignity by all lawful means," as was *The Pierrepoint* case, but there are no such words here; still, suppose there had been, this would make no difference, so long as unlawful means might be resorted to, upon lawful means failing; for the encouragement to wrong-doing would still be held out, and it might be effectual notwithstanding the qualification adjoined by

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way of guard. In that case, it was very far from clear that the dukedom might not have been sought, and even obtained, without corruption, by "best, becoming, and lawful means," the expressions used in the will. The sum of ten thousand pounds, a sum at that time equal in force and effect to twice as much at the present day, might have been judiciously employed to increase, and (the 49 Geo. III., against buying seats not having passed) by lawful means to increase, the Court's minority upon the Exclusion Bill; and no service would have been more gratefully acknowledged by the King and the heir presumptive, none more liberally rewarded. Yet the possibility of another use being made of the money, determined that great Judge, renowned alike for sagacity, and incorruptible integrity in **facie Romuli*, Lord NOTTINGHAM, to allow the demurrer and dismiss the bill, "for that it is against the law that such titles and honours which are properly the rewards of virtue and merit, should be purchased by money." Can we doubt that if he had seen an estate of a hundred times the value made to depend upon obtaining a dukedom, he would have rejected the suggestion that this "title and honour" might have been sought after by "best becoming and lawful means," and that the use of none other was to be presumed? Enough that other means might have also been employed, and that even if the terms of the condition did not suggest, nay, though they excluded such a course, it yet easily came within the provision.

In later times, the same disregard of the comparative probability of the two courses being taken has been evinced by the language of the Courts, the tendency towards the undue proceeding being held sufficient. In *Jones v. Randall* (1), which was the case of a wager on the event of an appeal to this House, and held to be a merely innocent wager, Lord MANSFIELD said that had it been with a Lord of Parliament it would have clearly been unlawful and void, and why? "On account of its mischievous tendency," says Lord ELLENBOROUGH, in *Gilbert v. Sykes* (2); and yet, as was stated by his Lordship, "the danger of influencing these illustrious persons, who would not probably mix at all in the decision, was infinitely remote; but notwithstanding the improbability of any mischief in fact, it was void on account of its tendency upon general rules of law." Not only his Lordship in that case, but LE BLANC and BAYLEY, Justices, applied the same general rules on the same grounds, refusing to take into account the remoteness of the risk

(1) Cowp. 37.

(2) 16 East, 158.

that assassination would be committed, or the policy of the *State be interfered with. So in *Cole v. Gower* (1), where the Court was pressed with the argument that the security in question never could have induced the parish officers intentionally to let the pauper child perish, the Court said that on principles of public policy it could not allow them to acquire such an interest, whether they were likely to abuse their trust in consequence or not. My noble and learned friend referred to the established rule of law that seamen's wages are not to be insured, because of the tendency of such an interest to interfere with their duty. But no one ever seriously argued against this rule, by contending that a man's interest in the premium on the policy would be less powerful than his interest in saving himself from shipwreck.

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The case has been put of a gift conditioned upon the party obtaining a living; and the possible tendency of this to encourage simoniacal traffic has been supposed to be no impeachment of the gift. It is easy to put such cases in which a very trifling variation would certainly make the condition illegal, on that very ground; from the somewhat anomalous state of our law respecting simony such cases may easily be suggested. But what shall be said of a bequest to all the adult males of a parish where sectarian feelings combined with political violence ran high, 10 per cent. to be paid down, the residue when A. B. ministering to a small minority of the people, should cease to be the rector? There are parts of the United Kingdom in which A. B.'s life would not be insurable, though, without doubt, the parishioners might entitle themselves to the residue of their legacies innocently, by investing the 10 per cent. in the purchase of the next presentation to another living, or in obtaining from the incumbent the *resignation of his cure. But the possibility of a crime being committed, would make the condition at once be deemed illegal which had a tendency in that direction.

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Thus far, touching the tendency of the condition to produce and facilitate attempts at obtaining the dignity by corrupt means—attempts, it is admitted, unlikely to be made at the present day, and if made, still more unlikely to succeed. But there are other means of a far less guilty cast, and which are not to be rejected from our consideration; for they are neither so unlikely to be employed, nor are they without great injury to the public weal. As the stern voice of prerogative has been said to be replaced by the

(1) 6 East, 110.

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gentler accents of influence on the part of the Sovereign, so, on that of the subject, the ruder forms of corruption have assumed the less repulsive features of intrigue. But as regards the duties and the functions of the Legislature, the law and Constitution are inflexible; its members, whether by hereditary or elective right, are there only to consult *circa ardua regni*; and though in their corporate character they, like the Sovereign, can do no wrong, individually they may be seduced or deterred from the due discharge of their office, Dignities are, in contemplation of law, to be bestowed for services or other merits. But they may likewise be sought by submitting to the personal views of a minister; by exerting the influence of property so as to affect elections; by using that property in a way that the law discountenances; or by guiding the conduct of the persons returned to Parliament; or by directing the course of those filling hereditary seats; directing it away from consultation for the interests of the realm and towards the attainment of the desired advancement. Now, in point of fact, it is as certain as the existence of Parliament, that the views of men are occasionally thus pointed, and their conduct guided by these motives.

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For examples of this we need not go back to the body which existed less than a quarter of a century before the date of this will, sitting in a House which a bystander, a dignitary of the Church, described as "half a bow-shot from the college," and where contracts were notoriously made for time, that is, political support hired out for a few important months, or even weeks, when some crisis gave each vote a high value; when, therefore, its skilful use might secure a step in the peerage,—a possibility, doubtless, which occasioned the same eminent authority to remark, that "the attitude of climbing and of crawling is the same." In purer times and places, the conduct of higher men, in both Houses of Parliament, has been notoriously all but avowedly shaped by the desire of obtaining a title or a step in the peerage. It is, therefore, idle to represent the condition which makes acquiring a dukedom necessary to preserving a vast estate, as only contemplating a bare possibility,—as not addressed to the Parliamentary conduct of the party invested with the precarious possession,—as not likely practically and in fact to sway that conduct. But the law reprobates the yielding to such sinister motives, reprobates both the direction of that conduct in order to obtain the dignity, and the grant of the dignity in consideration of that conduct; and not only reprobates, but discourages, forbidding both the wrongful course and whatever

has a tendency towards making it be pursued. We are not, therefore, allowed to say that the party should not be presumed to seek the honour by undue means, or the dispensers of Royal favour to grant it for reasons other than his merits. It is very possible that neither the one nor the other blame may be incurred; that neither the individual nor the minister may swerve from the line of their duty; it is even far from probable that neither will; but the law regards possible events not more unlikely than these; and *taking security against the infirmity of human nature, regards the tendency as well as the act, and removes the motives to offending, that it may not have to punish the offence.

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And truly, when we find such remote probability of abuse as amounts to a bare possibility made the ground of decision, the bare possibility of a Peer being influenced by a five pounds wager to decide a cause on which it was next to impossible he should ever sit in judgment, we may well take into our consideration the possibility of his political conduct, his voice upon questions of public policy, being biassed by the desire of obtaining the dignity which should protect himself or his family from ruin. Yet it is undeniable that the yielding to this bias is a plain breach of duty, especially in a Peer, inasmuch as it is contrary to the exigency of the writ whereby he is summoned to attend and to deliberate. That the minister who, to reward such an adherent, prostituted the honours of the peerage, would be culpable, is not denied, but it is a guilt very far from unprecedented. In the present case, it would be all the more grave, because of the injury that it must work to the devisees over; and accordingly, titles have been refused (I speak with official knowledge of this), even leave to change a name has been withheld, in order to avoid all preference of parties minded to act *ad captandum legatum*. But all this does not in anywise weaken—it greatly strengthens—the argument; for it illustrates the tendency of such conditions to undermine the virtue of the complying minister, as well as of his unscrupulous partisan.

My Lords, upon these grounds I entirely agree with the proposition of my noble and learned friend, namely, to reverse the decree now under appeal.

The illegality of the condition subsequent, renders it immaterial to consider the question of the jointure.

LORD TRURO:

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I concur in the opinions which have been expressed by the two

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noble and learned Lords who have preceded me, that the judgment of the Court below ought to be reversed. The reasons which have led me to that conclusion are very much the same as those which have been stated by my noble and learned friend who first addressed your Lordships; and not having been previously acquainted with the contents of my noble friend's judgment, although I was apprized generally of its result, I trust your Lordships will excuse me if, in stating more particularly the grounds of my judgment, I should seem to be repeating much to the effect of what that noble and learned Lord has already better expressed.

Your Lordships are aware that Lord Bridgewater's will devises the estate to trustees, with a direction that a settlement shall be made embodying the limitations and uses mentioned in the will, including certain provisos for the determination thereof, inserted in a subsequent and distinct clause of the will. The first question which arises upon the proviso now in question is, whether it should be construed to have the effect of a condition precedent or of a condition subsequent.

This point becomes extremely important in the present case in reference to the second question which your Lordships will have to decide, that is, whether the proviso (which, for convenience has been called a condition, but which, correctly speaking, it is not), that the limitations in favour of the Brownlow family should cease in the event of the title of Marquis or Duke of Bridgewater not being acquired, is a proviso which the law will allow to bind the estate; and as it is possible that the legality or illegality of the proviso may in some degree influence its construction, for the purpose of considering its construction I shall, in the outset, assume that it is illegal, and shall reserve *any observations upon that point, until after my remarks upon the construction of the clause itself.

The following is the proviso to be construed. (His Lordship here read it.)

It may be convenient here to advert to the rules or principles of construction connected with the right decision of this case. Thus, the intention of the testator is the governing principle in the construction of wills; and this intention is to be collected from the whole will, and not from particular expressions or detached passages alone. But, on the other hand, in the case of trusts executed, such intention of the testator must be collected, not conjecturally, but from the language of the will itself; and words and forms of

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expression having a known legal import must be understood in their technical sense, unless it is to be collected from express words or by plain implication that they are to be understood in some other sense. And although, in the case of executory trusts, the Courts have, in certain cases, properly assumed a greater freedom in effectuating what appears to be the general intention of the author of the trusts, yet, even in the case of trusts executory, an intention must not be imputed by mere uncertain conjecture in contradiction to the express words; and especially where it is manifest that the will was drawn, not by a person who used technical expressions without knowing the meaning of them, but by a person well skilled in the practice of conveyancing. Again, although the Courts will frequently alter the position of words and clauses, and put other meanings upon them than those which they *primâ facie* import; yet this is never to be done to give effect to an unlawful intent, nor in any case where such alteration or interpretation is not absolutely necessary. Moreover, where a gift is good in itself, but is followed by an unlawful or repugnant condition or qualification in a distinct clause, the gift is upheld and the *condition or qualification which alone is obnoxious, is rejected.

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The first part of the proviso, which in terms purports to cause the cesser of the use and estate directed to be limited to the heirs male of Lord Alford, in case of his dying without having acquired the title of Duke or Marquis of Bridgewater, is in the nature of a condition subsequent, and not of a condition precedent. The proviso is not in the nature of a condition precedent,—no estate is to arise on its fulfilment; nor is it a conditionall imitation properly so called, because, although it purports to defeat a use or estate, it does not create a new estate or interest in the room of the use or estate so defeated. Nor is it simply in the nature of a condition subsequent, because it not only defeats one estate or interest, but it proceeds to provide that the property shall go over to the objects of the ulterior limitations. In truth, it is what the testator himself designates it, a proviso for the determination of the use directed to be limited to the heirs male of Lord Alford; and it is also a proviso which thereby and by express provision, accelerates the subsequent estates or interests. It is similar in this respect to the proviso in the case of *The Earl of Scarborough v. Doe d. Saville* (1), except that in that case the cesser was of a vested interest, whereas, in the present case, it is a cesser of a contingent interest.

(1) 42 R. R. 306 (3 Ad. & El. 897).

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But the first part of the proviso in question is in the form of a condition subsequent, penned in the regular technical way; for it is annexed to an estate or interest created by a previous clause or previous part of the instrument; and on the failure of the condition the use or estate is "to cease." Whereas, if it had been of the nature of a condition precedent, framed in the ordinary *technical way, it would have formed a part, and usually and more properly the introductory part, of the clause whereby the estate to which it is annexed would be created; and upon the fulfilment of it an estate would arise: see Baron ROLFE's remarks in *Cooke v. Turner* (1). It is also an important circumstance that this proviso is in the precise form of conditions in the same will, which are beyond all dispute of the nature of conditions subsequent. It is true that no precise technical form or position is essential to render a condition precedent or subsequent. If it can be collected from the will itself that the testator's intention was that the condition should be a condition precedent or that it should be a condition subsequent, it is to be so construed. I refer to the remarks of Justice ASHHURST in *Hotham v. The East India Company* (2), and of Lord KENYON in *Porter v. Shepherd* (3). The remarks of Lord TALBOT in *Robinson v. Comyns* (4), properly considered, are not inconsistent with this statement.

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As the proviso in question is in the regular form of a condition subsequent, and as it is in the very same form as the other provisos in the same will, which are unquestionably of the nature of conditions subsequent, the *onus* of showing that it was intended to be the very opposite of that which on its face it would appear to be,—that is, the *onus* of showing it to be a condition precedent, lies upon those who would put that construction upon it. As the use or estate was only to cease or be void on the given event, on the death of Lord Alford, before which time it could not vest, as it was to cease and be void before it had ever vested, it has been contended, and the majority of the learned Judges have adopted the position, that, by reason of the contingency, the words "cease and be void" can have no correct and *appropriate application to the use and estate referred to. It is said that, the use and estate not being vested, it cannot cease and be void, and consequently the proviso cannot operate as a cesser or determination; and that, to have any effect, the proviso must be construed as a declaration that

(1) 65 R. R. 641 (14 Sim. 503).

(2) 1 R. R. 334 (1 T. R. 645).

(3) 3 R. R. 305 (6 T. R. 668).

(4) Ca. temp. Talb. 166.

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the acquisition of the prescribed dignity should operate as a condition precedent to any use or estate arising or vesting; in which case the legality or illegality of such condition precedent is immaterial. It has been assumed to be so clear that the proviso can have no operation as a cesser or determination of the contingent use or estate, that neither from the Bar nor by the Judges has any reason, principle, or authority been mentioned or adduced in support of the point. It appears to me, that the learned Judges (owing perhaps to the little time and opportunity afforded them for research) have mistaken the common and ordinary examples of a rule, for an exact and perfect definition of it. I do not deny that the examples on which those learned persons would seem to have relied, may be in the nature of a condition precedent or subsequent, but I cannot assent to the assumption that they form the limits of the rules by which provisions of such a nature are to be ascertained.

This will, my Lords, is evidently drawn by a skilful draughtsman; numerous contingencies which might interfere to thwart or disappoint the testator's intentions or wishes are anticipated and provided for with a degree of ability and professional skill which, if correctly estimated, must induce great caution and mistrust in entertaining an impression or opinion that the draughtsman had adopted words which, although of known established technical meaning, were yet senseless and inappropriate in relation to the use and estate of which he was speaking, and were incompetent to produce the legal effect for which he used them, and, in *fact, rendered the proviso, as he framed and intended it, incapable of any sensible or legal construction. It seems to me that the expression here used is perfectly correct as applied to the gift or the interest made or created by the limitation; for a contingent gift or interest has an existence, capable, as well as a vested interest or estate, of being made to cease and become void. The vesting has nothing whatever to do with the question; it is perfectly immaterial. In the one case, a contingent gift or interest exists; in the other case, an actual estate exists; the two things are very different, but each exists, and each may properly be made to cease and become void. And, indeed, a use, *eo nomine*, though it be only inceptive, inchoate, or potential, may be properly said to exist, and to cease and become void, as well as a use clothed with the actual seisin, or, in other words, an actual estate. Who can deny that even a chance may exist, and a chance be made to cease?

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My Lords, it may be admitted that it was the object of the proviso and the intention of the testator that the use of the estate to the heirs male of Lord Alford should not effectually vest at his death, otherwise than in the event of his having acquired the title of Duke or Marquis of Bridgewater. But it should be observed that that object and intention would be equally accomplished by construing the condition, if valid, a condition subsequent.

But it seems to be further contended, not only that such was the intention of the testator, but that the effect of the proviso was that, from the very necessity of the case, the use or estate to the heirs male of Lord Alford could not vest at his death otherwise than in the event of his having acquired the title of Duke or Marquis of Bridgewater; and that therefore the proviso, coupled with the limitation to which that proviso relates, virtually amounts to two conditions precedent, such as these: "If Lord Alford should acquire the title of Duke or Marquis of Bridgewater, then to his heirs male; but if he should not have acquired that title, then over;" which is what is commonly called a contingency with a double aspect; and that, consequently, the proviso, as regards the use to the heirs male of Lord Alford, is, in fact, a condition precedent, and attended with the incidents of a condition precedent.

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This reasoning, however, appears to me to be fallacious, and little short of confounding things which are essentially different. For as the very learned editor of Gilbert on Uses (page 177), observes, "The distinction is very refined, but is certainly well established, that if an estate be limited to A. until B. return from Rome, and after B.'s return, to C., the limitation to C. is a good contingent remainder; whereas, if the estate is limited to A. for life, with a proviso that if B. return from Rome the estate shall go to C., in this case the limitation to C., although precisely the same as the former in effect, is not a remainder, but what is generally termed a conditional limitation." The very affirmative words which have been constructively supplied in the present case, viz. "If Lord Alford should acquire," &c. are wanting; we have only the negative words, "if he should die without having acquired," &c., which constitute a condition precedent in regard to the acceleration of the posterior uses, but a condition subsequent as regards the prior use to the heirs male of Lord Alford. Take the words as they stand, and then according to their *primâ facie* and technical import; what the testator says, is this, not that an estate to the heirs male is to arise on a given contingency, which would be a condition precedent; but

that an estate previously directed to be limited to the heirs male should cease on a given contingency, which is a condition subsequent. As little are we authorized (I conceive) to supply the affirmative words above mentioned, *as we should be authorized to supply the collateral limitation, "until B. shall return from Rome" in the example just given of a conditional limitation by the learned editor of Gilbert on Uses. To do so would be to translate the testator's language into words of a different legal import, and thereby, as I shall presently endeavour to show, defeat instead of effectuate his intention. The mere fact that if the condition determines the use at all, it must determine it before ever it could vest even in interest, does not show that it was a condition precedent; it may virtually have the effect of a condition precedent in this respect, without being a condition precedent in its form, or of the nature of one, and without being attended with the incidents of a condition precedent.

My Lords, it appears to have been assumed that, according to the definition, and, indeed, according to the import of the very term itself, a condition, to be a condition subsequent, must necessarily be a condition to defeat a use or estate subsequently to its having become actually vested, that is, vested in interest at least. It is true, indeed, that ordinarily the use or estate which is defeated by a condition subsequent has become vested before the time when the condition defeats it; and it may be admitted, at least for the sake of argument, that one reason why a condition subsequent was so called, is that it is a condition which ordinarily defeats a use or estate subsequently to its vesting. But although this may be one circumstance from which it may have derived its name, yet its nature is not necessarily restricted to the thing from which its name is derived. Although the condition may have received that name because such an operation is ordinarily incidental to it; yet even if this were the only reason why the condition was entitled a condition subsequent, that fact would not prove that in all cases the use or estate to be defeated must *be actually vested before the condition operates. But there is another reason why a condition subsequent may have received that name. A condition may be called precedent when it precedes, and because it precedes, the words of gift; and a condition may be called subsequent when it follows, and because it follows, the words of gift, whether that gift is vested at the time when the condition (which follows it) is to operate or not. Regularly a condition precedent does in form precede, and a condition

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subsequent does in form follow the words of gift; and in all cases a condition precedent does, in substance, and by construction at least, precede the gift, and a condition subsequent does, in substance and by construction at least, follow the gift; for, if the gift is to arise upon a condition, such condition must in substance precede the gift; and if the gift is to be defeated, or the use or estate is to cease or determine by the condition, such condition must in substance follow the gift: the gift in the latter case must have an existence antecedent to the operation of the condition which is to defeat it, or cause it to cease or determine.

For these reasons, my Lords, it seems to me that no satisfactory grounds have been shown for the position that a condition subsequent can operate only upon a vested estate or interest, or that a condition subsequent cannot operate to defeat a use or estate before it can vest, as well as an estate subsequently to its vesting.

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But to get rid of the argument arising from the frame of the condition, it has been urged that this is not a case of a trust executed, but of a trust executory, that is, of a trust raised by a direction in the will to make a settlement to uses, or upon trusts which are indicated in such will; and no doubt this is a case of a trust executory in that sense of the word, and that in the case of a trust executory, a court of equity is in the habit of directing *the property to be settled in such a mode as will best carry out the testator's intentions: see *Jervoise v. Duke of Northumberland* (1); *Duke of Newcastle v. Countess of Lincoln* (2). But admitting all this, the *onus* still lies on the party contending that this proviso framed as a regular condition subsequent, is a condition precedent, to show that, in reality, it was intended to be a condition precedent. How then is such an intention manifested, or on what grounds is it clearly presumable? I do not perceive any necessary or plain implication, any vehement or strong presumption, any clear or sufficient indication of such an intention. But I do see what appears to me to be perfectly conclusive ground for holding that an intention existed that this should not be a condition precedent.

Not only does the testator, or rather the skilful draughtsman for him, adopt the frame of a regular condition subsequent, but he designates the provisoes embodying that condition, and the other conditions which are unquestionably of the nature of conditions subsequent, by one general term of "provisoes for the determination of the uses and estates directed to be limited." The true character

(1) 21 R. R. 229 (1 J. & W. 559).

(2) 4 R. R. 31 (3 Ves. 387).

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of those provisos is therefore described in the will itself. But independently of this, there are very strong grounds for negating the presumption (if any existed from any other circumstances), that this is of the nature of a condition precedent. I conceive that probability, and reasonable and strong, if not vehement, presumption, are all in favour of the construction that this is of the nature of a condition subsequent. The will of the Earl of Bridgewater, although it may not be faultless, is yet admitted evidently to be the production of a gentleman well skilled in the law of property and in conveyancing practice. And it may, I *think, be fairly considered that he knew that the conditions he was instructed to insert were of questionable validity, and that he, therefore, very prudently and properly adopted a course which he knew to be safe with regard to those conditions, by making them conditions subsequent. But whether he knew this or not, one thing is certain, that the insertion of a condition subsequent was safe whether valid or not, while the insertion of a condition precedent would have been most mischievous, and subversive of what we may fairly presume to have been the most important designs of the testator. For assuming the condition to be bad, it would do no harm if subsequent; whereas, if bad and precedent, though in one limited view it might accomplish the testator's intent as regards the heirs male of Lord Alford; yet while the heir male of Lord Alford, though the prior object of the testator's regard, would lose his estate, it would go to those who were only secondary objects of his regard, and be held by them freed and discharged from the condition, which, in their case, would still be a condition subsequent, and which, therefore, if bad, would be wholly inoperative. This would be a consequence which it can scarcely be contended the testator contemplated.

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The grounds on which I say that the condition in their case would still be a condition subsequent are these: the operation of the first proviso is made dependent upon a single circumstance, viz., the non-acquisition of the title by Lord Alford, during whose life the limitation to the heirs male of his body was necessarily contingent. But as regards the second proviso, relating to the heirs male of C. H. Cust, the operation of that is made dependent upon two circumstances, namely, the non-acquisition of the title by C. H. Cust (during whose life the limitation to the heirs male of his body would also be necessarily contingent), and also the non-acquisition of the title with certain special limitations by Lord Alford, and

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which he might have *acquired after the death of C. H. Cust, and, consequently, long after the limitations to C. H. Cust's heirs male had become actually vested.

The distinction between the first and second provisos in this respect, or at all events, the consequences of that distinction as regards the defeating instead of effectuating the general intention of the testator, would seem to have escaped attention. The limitation to the heirs male of C. H. Cust is only contingent on account of the person. It is not contingent by reason of the second proviso relating to the acquisition of the required title. For it is a rule, that an interest shall, if it can consistently with other rules of law, be construed to be vested, either in the first instance, or as early as may be, rather than contingent; and the second proviso relating to the acquisition of the required title by Lord Alford or C. H. Cust, does not prevent the application of this rule, for that proviso (as far as regards the words of cesser) is not only capable of being deemed to be of the nature of a condition subsequent, so as not to interfere with the vesting of the limitation to the heirs male of C. H. Cust on his death; but so far as regards the words of cesser, it is in the precise technical form and language of a condition subsequent, insomuch that to hold it to be of the nature of a condition precedent would be a gratuitous infringement of the rules of law, both as to the construction of conditions and as to the construing interests to be vested rather than contingent. Hence if C. H. Cust had died in the lifetime of Lord Alford, the heir male of C. H. Cust would have taken a vested interest under the limitations of uses, and notwithstanding the second proviso; and in that case, if Lord Alford had not subsequently acquired the prescribed title, and C. H. Cust had not acquired it before his death, in the lifetime of Lord Alford, the second proviso would, as being in the nature of a condition subsequent, defeat such vested interest in the *heir male of C. H. Cust, if such second proviso was legal; but if such second proviso was illegal, the property on the death of Lord Alford would, by virtue of the first proviso (supposing it to be of the nature of a condition precedent, whether legal or illegal), go over from the heir male of Lord Alford, the primary object of the testator's bounty, and would vest in possession in the male heir of C. H. Cust, the secondary object of the testator's bounty, unaffected by the second proviso, as being of the nature of a condition subsequent and illegal, or by any condition whatever. Thus if the condition were bad, the only effect of holding it to be a condition precedent would be this: to cause

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the prior objects of the testator's bounty to lose the estate under an unlawful condition, because the dukedom or marquise was not acquired by descent, and to give the estate to the secondary objects of the testator's bounty, though they might not possess the title, which it was equally the desire of the testator that they should possess, if they should become the owners of his property. This would be accomplishing a part only of the testator's intention, in such a way as to be utterly subversive of his real intention as a whole. For it can never be supposed that he could wish to take the estate in effect from the prior objects, and give it to the secondary objects of his regard, when the condition would be as unfulfilled by the secondary as by the prior objects.

I have considered the case as if it had been a question whether the words constituted a condition precedent, or a condition subsequent. But I have already intimated that in reality the proviso containing the contingency, is neither a condition precedent nor a condition subsequent, but "a proviso of cesser and acceleration." And whatever might be the true decision if this were strictly a question between a condition precedent and a condition subsequent, the case *assumes a very clear form, when it is considered, as it is in fact, a case of a distinct proviso of cesser and acceleration, even separated (though I need not lay any stress on that circumstance) by an interval of several pages from the limitations of the uses.

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My Lords, the case thus considered resolves itself into this short form: First, there are certain limitations of uses; secondly, there is a proviso of cesser and acceleration of some of those uses. The limitations of uses are free from objection. The proviso of cesser and acceleration is alone the subject of objection. If that objection is well founded, if the proviso is invalid, the limitations of the uses remain unaffected by it. The gift being valid in itself, and the proviso which occurs in a subsequent part being alone obnoxious, such proviso must be regarded as struck out of the will. If it be said that the testator would not have inserted these limitations of uses, or would have varied them, if he had known that the proviso of cesser and acceleration was to have no effect given to it, I answer that that is a mere conjecture on which no Judge can act.

I may here observe, my Lords, that it appears to have been thought that the inoperativeness of a void condition subsequent, or of a provision of the nature of a condition subsequent, depends

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on the circumstance of its being annexed to a vested interest ; but I apprehend that the reason of that inoperativeness is not merely the reluctance of the law to defeat vested interests, but the repugnance of the law to illegality, and the rule "that no provision (whatever may be its nature), dependent on any illegal event for its operation, shall have any effect." In concluding this part of the subject, I may here remark, that the opinions I have expressed, as to the nature and effect of the first proviso, are the conclusions at which I have arrived, treating, as the learned Judges were directed to treat, the dispositions *in this will as legal limitations. Considering them as executory trusts, I think the grounds for those conclusions would be still stronger ; and if I had not been satisfied that the first proviso, so far as regards the words of cesser, is of the nature of a condition subsequent, and that the words "cease and be void" would be capable of having effect given to them, even if this were a trust executed, I should have taken the course suggested by one of the learned Judges, Mr. Baron ALDERSON ; namely, to submit to your Lordships the expediency of considering the question as depending upon an executory trust.

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My Lords, for the opinions of all the learned Judges I entertain a most unfeigned respect, and it is a subject of regret with me that those very learned persons have not had more time and better opportunities to form the opinions for which we have had to thank them. I know, from experience, too well what the duties of a Judge on circuit are, not to feel how fully they are entitled to the indulgence with which several of them have begged your Lordships to receive their opinions ; but I cannot forbear adding a hope, that this case will not be hereafter cited as a precedent for any Judge expressing an opinion, unless he is himself present, when there shall unfortunately be a difference of opinion among the learned Judges.

Upon the grounds I have stated, I have come to the conclusion, that the proviso is in the nature of a condition subsequent, and will operate as such, if legal, but if it be illegal, it must be rejected as if it were not contained in the will, and the gift will remain unaffected by it.

As to the legality of the condition embodied in the proviso : I have hitherto assumed that the proviso by which the limitation to the heirs of the body of Lord Alford is restrained from taking effect, otherwise than in the event of Lord Alford, during his life, obtaining the title of Duke or Marquis of Bridgewater, to be illegal and void, and I now *submit to your Lordships the grounds upon

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which I think the correctness of that assumption is established. In considering the question of the legality of the proviso and the inexpediency of unnecessary restrictions upon the free disposition of property by will or by any other means known to the law, it cannot be denied that such dispositions are subject to some limits and restraints, and that the law will not uphold such as have a tendency prejudicial to the public weal: every man is restricted against using his property to the prejudice of others. The principle embodied in the maxim, *Sic utere tuo ut alienum non lædas*, applies to the public in at least as full force as to individuals. There are other maxims equally expressive of the principle, *nihil quod est inconveniens est licitum*, and *salus reipublicæ suprema lex*. The principle I conceive to be universal, as governing as well transfers by deed as the validity of contracts and dispositions by will; I know of no text-book or case impugning this principle; confusion occasionally arises from considering cases as establishing a principle, when they are, in truth, but instances of its application. It must be superfluous in this House to cite authorities to prove the existence of such a general law. It is to be found enunciated in our law-books from the earliest times, and by names of the highest authority in the law, by Lord COKE (1), by Bracton (2), and in Sheppard's Touchstone (3), which I believe is the work of Justice Doddridge, by Lord HARDWICKE in *Chesterfield v. Janssen* (4), by Lord KENYON, and Mr. Justice LAWRENCE in *Blachford v. Preston* (5); and it has been acted upon in a great variety of cases, such as those of marriage brokage bonds, restrictions upon trade, disability *of sailors to insure their wages, and sale of offices not within any statute. A case of this last sort was *Hannington v. Duchatel* (6); that was a case of security given as a consideration for having procured an office in the King's household, and Lord THURLOW expressed himself to the effect that it was "a matter of public policy similar to marriage brokage bonds, where, though the parties are private, the practice is publicly detrimental." The same principle has been applied in cases of wagers respecting the public revenue, and numerous other instances. This principle has been expressed in different language, but in all cases to the same import as applying to matters contrary to law because against the public good.

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(1) 1 Inst. 206, b.
 (2) Bk. iii. fol. 100.
 (3) Chap. vi. 132.

(4) 1 Atk. 339, 352.
 (5) 8 T. R. 94.
 (6) 1 Br. O. C. 124.

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Some criticism has been made in relation to the language in which the principle has been expressed; exceptions have been made to the expression of "public policy," and it has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign States; with all which, as applied to the present subject, it has nothing whatever to do. Public policy, in relation to this question, is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the law, or public policy in relation to the administration of the law.

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I shall, therefore, assume that a disposition of property by will, equally with a disposition in any other form, which has a tendency injurious to the public interest or good, the law will not uphold, and the law looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the disposition; and if the law is *to be practically applied, it cannot be administered with reference to the character of the individuals to whom the question may relate.

It has been said that this rule is too uncertain and vague to be capable of practical application by Judges, on account of the various opinions which may be entertained on the subject of public policy; but I think that that remark has no just foundation. There is no uncertainty in the rule that the law will not uphold dispositions of property and contracts which have a tendency prejudicial to the public good; there, no doubt, will be occasionally difficulty in deciding whether a particular case is liable to the application of the principle; but there is the same difficulty in regard to the application of many other rules and principles admitted to be established law. The principle itself seems to me to be necessarily incident to every State governed by law. Judges who are charged with the duty of seeing that dispositions and transactions are not upheld and enforced which are contrary to the spirit of the law, must be presumed to take care not to apply the law to doubtful cases, so as unnecessarily to interfere with transactions which are the subject of judicial investigation. It is true, as I have before said, that remarks have been made upon particular cases as calculated to impugn the principle, when the point of doubt has really been whether the circumstances of the particular case brought it within the principle.

The facts, of which the tendency to affect the public interest is to be determined in this case, are these: a vast estate is given, and the continuance and permanency of the gift is sought to be made to depend upon the event of a certain title of peerage being obtained. The object, as declared, being to annex the estate to the title required; and the question is, has the hope of retaining an estate of *70,000*l.* a year by the acquisition of the title referred to, any tendency to influence the devisee to a conduct which may be inconsistent with his public duty as a subject, and prejudicial to the public good? This question relates to the tendency of the hope upon practical conduct.

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Now, my Lords, the materials for arriving at a sound conclusion upon the question must be gathered from a consideration of the political and social state of the country. It will not be necessary to refer to history to ascertain the particular sources of influence by which the grant of peerages may have been obtained, or what change in those sources may happen at any future period. It is not necessary to inquire whether those of the year 1668, when the case of *The Earl of Kingston v. Pierrepont* occurred, in which a sum of 10,000*l.* was bequeathed to be employed in "all lawful means" to obtain a dukedom, which bequest was held to be void, may be identical with those of after-times, because the principle of the Constitution is, that a peerage should at all times be conferred with reference only to the character and circumstances of the individual elevated, and that pecuniary or any other influences, apart from those merits, ought not to be exercised or prevail. But the question must be determined by the tendency generally of the possession of such vast wealth being made dependent upon the acquisition of a peerage, or an elevation to a higher rank in it, to furnish motives calculated to influence the conduct of the devisee and to make him act upon motives independent of a sense of duty. The question is not affected by the character, or supposed character, of the individual who may be placed in such circumstances: the general tendency of being placed in such a situation is the point to be considered.

My Lords, in considering the question proposed, I do not think it proper or necessary to introduce the name of *the Crown as the fountain of honour, further than to say that, constitutionally, the Crown is under no legal responsibility in relation to the exercise of its prerogatives, and that the Crown is esteemed never to act upon its own motion and impulse, but by the advice of those who are

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held responsible to the public for their due exercise. If the law is to be administered faithfully, the question must be considered with reference to the fact, that it is the Minister of the day by whom and through whom, in substance, peerages are acquired. Let any one look through the list of creations since the commencement of the reign of George III. and say if there are not instances (not to say how many) of elevations to the peerage of individuals whose public merits entirely eluded public attention, and whose elevations, whatever those merits might be, could only be ascribed to Parliamentary or political influence. Probably there are few persons with so little regard for their credit as to controvert the fact. With the exception of persons engaged in the public service, and of a very few other persons, has it not been the course for such patents to be conferred upon the adherents of the party in power or of the Minister of the day, or have they not frequently resulted from Parliamentary influence? However fortunate each Minister may have been, in his turn, in the great merits and virtues possessed by his adherents and his party, yet many not very suspicious persons do not doubt that those merits would have gone unrewarded unless they had been associated with Parliamentary power and influence. The possession of Parliamentary boroughs and a large expenditure in aiding the election of party associates, have certainly not been unsuccessful in arresting the attention of the Minister of the day to the merits of those adherents who were owners of the boroughs and expenders in elections. Those *who affect to doubt upon this subject may arrive at a satisfactory conclusion by ascertaining what proportion of the peerages within the period I have mentioned, or of the advancement of the old ones, has fallen upon individuals not belonging to the party in power at the time of their elevation. Can it be said that, at the present day, no peerages have been acquired by the influence of party and Parliamentary support? Does experience warrant the conclusion that the devise in question has no tendency to furnish a motive for public conduct independent of duty?

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My Lords, in considering the effect of the hope of retaining the estate by procuring a higher title by an existing Peer already charged with high duties of a legislative, political, and judicial character, can it be said that it has no tendency to influence him in his public conduct? Or in case of a commoner, to induce him to create and exercise a Parliamentary influence, and regulate his conduct with views resulting from other considerations than the

good of the State? Will it be asserted that motives much less cogent, though equally connected with personal objects, have not influenced political conduct on very important occasions? I repeat that what may occur in the particular instance is not the point; it is the general tendency. It has been said that the extent of the fortune should have no influence on the question; which, properly explained, can only mean that the degree or *quantum* of power to produce the evil referred to is not an ingredient in determining whether the devise has a tendency adverse to the public good.

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No advantage can result from putting a number of hypothetical cases which are supposed to have more or less analogy to the present. A difference of opinion may prevail in respect of each or many of the cases, as to their falling within the principle; and to arrive at a correct *decision may require as much examination and deliberation as the case in question, and without any advantage to be derived from the result. The present case must be decided with reference to a general principle, but the particular circumstances of the case are the only safe materials upon which to determine whether the case itself is brought within the general principle. I cannot doubt that the testator was too well acquainted with the state of that society of which he was a member, not to know the ordinary means by which individuals of large fortune have been elevated to the peerage, whose situations were not very likely to afford the opportunity of performing great public service, and that he never supposed that Lord Alford was in a station likely to have the opportunity of distinguishing himself by the performance of any such public services as would be calculated to insure the reward of a marquisate or dukedom, however eminent the personal virtues and merits of that individual might be, and no doubt were. The means which the testator put within his power would enable him to display a merit quite as likely to procure the desired distinction as public services, that is, the merit of becoming a powerful and influential political and Parliamentary supporter of the Minister of the day. Many individuals would hesitate to express a confidence in their political independence and virtue, if such merits were to be followed by a loss of 70,000*l.* a year.

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My Lords, I entertain the opinion that individuals ought not to be allowed to dispose of their property in any manner which furnishes a motive to conduct, in relation to acts of State, independent of a sense of right and duty. I can conceive no good motive to influence such a gift. It is plain that personal regard for

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the individual is not the only or even the principal motive for the gift. I admit the object sought to be attained is not illegal. I also admit *that illegal or improper means need not necessarily be used to attain it. But I do not think that the testator could have contemplated any legitimate means by which it could be acquired, and that he could have anticipated the use of any other means than Parliamentary or private influence, obtained through the medium of the means which he should furnish. But the views or intentions of the testator in this respect, do not, however, in my opinion, form material ingredients in the question. Giving credit for the purest intentions on the part of the testator, and the highest honour to Lord Alford and his parent Peer, I think the tendency of the devise ought to prevent those considerations from influencing the decision, and that that tendency is to induce the individual to apply his wealth to the furtherance of his great object in a manner which others had found to facilitate the attainment of similar objects, and to political conduct, regardless of the proper motives which ought to govern it.

My Lords, the case of *The Earl of Kingston v. Pierrepont* (1) has a strong bearing upon the present. In that case 10,000*l.* were given to the Marquis of Dorchester and William Pierrepont, to be applied by them "by all lawful means" to procure a dukedom. Upon a bill being filed to set apart that sum, to be applied according to the will, the bequest was held to be illegal and void. It will be observed that the testator sought to guard his bequest from objection by directing the application of the 10,000*l.* to be "by all lawful means." But the Court held that no lawful and becoming means could be discovered by which the 10,000*l.* could be applied to enable him to procure that title. In that case the money was given to be applied to procure the title. In this case the estate is to be *retained, if the title is acquired, and it is distinguishable from the case cited by the omission of any direction that the income to be derived from the estate should be applied to acquire the title. But I think the circumstance that the estate would be lost if the title should not be acquired, has such a tendency to induce the appropriation of the funds derived from the estate in endeavours to obtain the desired title, and to influence Lord Alford's conduct as a subject, as to bring the case within the principle of the decision cited.

My Lords, my opinion has been founded upon what I firmly believe is the just result of my experience of the present state of the

(1) 1 Vern. 5. See *ante*, p. 15.

political community which must be subjected to the operation of the proviso in question, and I cannot, when exercising the solemn duty of a Judge, deny or reject that experience in order to adopt a sentimental theory of purity, which, in truth, is not applicable to the present, and as to which I doubt whether it was applicable to any former, or will be applicable to any future, period of the history of this country.

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In conclusion, my Lords, I have to repeat that I think this restriction on the disposition of property being made dependent on matters of State, which furnish motives that have a tendency to affect the conduct of the object of such a disposition, as a subject, is not a restriction which can be deemed improperly or unnecessarily to interfere with the disposing power which the law has given. The caprice and fancy which may influence individuals, in regard to the disposal of their property, may have abundant scope for exercise, although not allowed to the extent of interfering with the public good. The power to regulate the disposal of property after death ought not to extend to the doing it in a manner tending to the prejudice of the living. And I think that to do it in a manner which furnishes motives for *conduct, independent of a sense of public duty, is a disposal tending to prejudice the living, and is such as the law will not uphold. And, upon this ground, I think the proviso by which the continuance of the limitation to the heirs of the body of Lord Alford is made to depend upon the acquisition of the title of Marquis or Duke of Bridgewater, is illegal, and being in the nature of a condition subsequent, that no effect can, by law, be given to it. And that, as the will contains a perfect separate limitation to the heirs of the body of Lord Alford, which character the appellant fills, full effect must be given to such limitation, and, therefore, that the decree which has been made in the cause must be reversed.

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LORD ST. LEONARDS :

My Lords, as it is my fortune to address your Lordships last but one upon this occasion, I shall take care not to go over the grounds which have been already laid before your Lordships, but in which I may say at once that I entirely concur.

My Lords, the questions here are of great importance in point of law—their importance in that respect exceeds even that which the case derives from the value of the property. The property, I take it in round numbers, may be considered as exceeding in value two

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millions of money ; but the questions of law are not less important, I am sure, in the estimation of your Lordships. I must say that I, for one, shall never again accede to any representation, under any circumstances, to hasten, as we have hastened, under peculiar circumstances, the decision of this case ; for it has led to considerable inconvenience to the learned Judges, and has pressed upon them in the manner to which they have adverted in their opinions, and which, no doubt, has a tendency to take from those opinions some of the weight to which, otherwise, they would have been entitled. If I differ in the result at which I arrive from those learned Judges, I must be considered to do so with the greatest possible hesitation, and with the greatest deference to opinions of which I know so well the value.

The questions, as it has been already stated, are two,—one upon the nature of the condition itself, whether it be what is called a condition precedent or a condition subsequent, and the other as to its legality or illegality. Now I look upon it to be of the highest importance to ascertain exactly what is the nature of the limitations, before we consider what are the particular provisions of this will. It seems rather late in the day to refer to first principles, but they lie in a few words, and they appear to me to be essential to the proper understanding of this case.

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Under the common law, as your Lordships all know, you could not create such estates as are now created, you could not raise a fee upon a fee, you could not have a possibility upon a possibility ; you were so crippled and confined, that even if you could manage to create a determination of an estate by a condition, the heir-at-law alone could take advantage of it. The consequence of which was, that you could have no limitations over to a stranger, or to other persons, in the way that you now have, by way of shifting or secondary uses. When uses were introduced, the law was entirely changed, and you were enabled, by means of uses, which were founded originally upon trusts, to introduce all those modifications of property which are now so well known in the law of this country. It seems, with regard to the opinions of all the learned Judges, to be of importance to ascertain what a contingent use is, because they seem to think that that which does not exist cannot be defeated, and that I understand to be the ground of the opinion which they have delivered upon this first point. Now, in point of fact, a use is a thing simply of confidence. If a man has a legal interest, which of itself is only a creation of the law, the law gives him the right to

the possession. But when you come to a use of or arising out of a legal estate, the use gives a right to the beneficial interest ; and the right to possession of the estate may be in one person, and the use or confidence in another. When, therefore, a man has a use, it is simply that there is a confidence placed in some person who has the legal estate, a confidence to permit him to have a usufructuary interest, that is, a thing which is simply a creation of equity. It is a thing which is not tangible,—it rests simply in confidence.

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When the Statute of Uses came, and transferred uses, not into possession, but transferred uses into possessions, that is, made uses possessions, and gave to the equitable owner, to him who had the use or benefit, the legal estate, it was a simple transfer, by force of the statute, of the legal estate, which we call the seisin, to serve those uses. What did the contingent use then become ? It did not alter its character, except in this respect, that the legal estate was carried to it, and so it was made in that sense a contingent estate. Speaking of a vested estate, for example, it is a possession when before it was a simple use or confidence. But being coupled with the legal estate does not alter its character beyond this, that it was a vested equitable estate, and is a vested legal estate. Instead of the thing being vested simply in confidence, the legal estate formerly in another is conjoined with it. If the use be contingent, there is no variance ; the contingency is a thing resting in confidence, and when the time arrives for that contingency to take effect, the statute executes that use or confidence, and gives the legal estate. Why should it not ? Before it vests, it is a limitation, and *it is a limitation of the use. What distinction can there really be in law as to the operation of defeating a confidence, whether it be a confidence to allow a person to enjoy an estate for the next ten years, or it be a confidence to allow me, if I go to Rome, for example, or if I have a son born within a certain time, to enjoy the estate from that period ? In either case it is a confidence. In the one case it is a confidence to be executed at once, and in the other it is a confidence depending upon a future event, but equally to be executed, and equally to be served out of the legal estate of the person in whom that confidence has been reposed. Upon the mere abstract question, Can a contingent use be divested, or not, before it actually takes effect ? I should say, Why should it not ? What is there to prevent you from saying, If a certain event arises I direct you to stand possessed of that estate upon confidence for A. B. C., and so on ? But if a certain other event should happen, I

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then tell you that that confidence is to cease, the trust is to cease, or the use, as we call it. The statute goes with and operates to give the seisin to all these uses, and they may all be determined precisely the same as vested estates. My Lords, I can have no doubt that a contingent use is a confidence, a trust, and therefore is an estate, first in equity, and then at law, but which, before the event arises, is just as capable of being defeated by a matter subsequent as any vested estate in the possession of any person.

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Now, my Lords, the next point which it will be necessary to ascertain, before we come to the discussion of the very point before your Lordships, is, What is the nature of these provisions ? I am sorry to differ from my noble and learned friend who spoke second, upon that question, but my impression strongly and clearly is, that it is not a case of condition at all. These provisions may in *common parlance be called conditions to enable us to judge of their validity ; because conditional limitations, such limitations as the law now allows, have been imported into the law from the law of conditions, and therefore it is that what might be illegal as a condition may still be illegal as a secondary or shifting use ; and that what might be a precedent condition at law before the operation of the Statute of Uses, may still be a contingent limitation since that statute. My Lords, I apprehend that it is perfectly clear that this is not a case of condition at all, but that it is a case of contingent limitations, with a series of shifting or secondary uses, limited upon those contingent limitations. Now that relieves this case very much from the difficulty that has been imported into it, in considering these provisos as if they were strict conditions at common law ; but, having regard to the different natures of the provisions, I am content, and must be content, to take the law of conditions as it stood as a precedent in this matter. I know, by the authorities which have been referred to, that conditions which were intended to defeat an estate have defeated an estate in contingency just as much as a vested estate ; that they are odious, as it is said, in law, and, as it is also said, by equally high authorities, the Institutes and Sheppard's Touchstone, that they must be submitted to a strict construction ; that is, you are not to give a favourable construction to a proviso, the object of which is to defeat an estate already created ; but that, if that estate is to be defeated, it must be so by clear and express terms, within the limits of the instrument creating it. So far, then, if this be a mere question of contingent limitations, we have to consider what are the limitations

created by the will. I think one thing is perfectly clear, that we can only collect the intention of this testator from the words which he has used, and that here, as in all *other cases, we are bound, if we can, to give the common meaning to every expression which we find on the face of the will. If you find that the expressions are vague, if you find that they are irrelevant, and that they are, as one of the learned Judges said, words, and only words, they will not prevent you from getting at the substance; but you must be satisfied, before you discard the ordinary meaning of language, or mould words to suit particular purposes, as the majority of the learned Judges propose to do in this case, you must be perfectly satisfied that you are called upon to mould those words, by taking them not in their common and ordinary import, and that by so doing you give them a meaning which expresses and effectuates the intention of the testator. You must give them the meaning which the testator had, and to which by law you must give effect.

My Lords, I would first, before I address myself to that point, call your Lordships' attention to the subject of executory trusts. If this could be deemed an executory trust, that construction would let in many arguments which would strike fatally at the view taken by the majority of the learned Judges. But, as I said upon a former occasion, when I stated my opinion to your Lordships, this is not a case of an executory trust; and I took particular care to draw the attention of the learned Judges to that question, and to state to them that their opinions were not asked upon that question. This House did not require the opinions of the learned common law Judges upon what was or was not an executory trust. The House had itself better means of deciding that point than fell within the reach of the learned Judges. But one of the learned Judges (Mr. Baron ALDERSON) has, although not asked the question, given his opinion that this is an executory trust. I am sorry to differ from that learned Judge, but I am *clearly of opinion, and as strongly as a man can be upon any point, that this is not an executory trust, and I advise your Lordships not to treat it as an executory trust, but to treat this will in all respects as if it had been a series of limitations of the legal estate.

Now, my Lords, with some knowledge of the proper mode of framing these instruments, I will take upon myself to state to your Lordships, that no legal instrument ever was prepared with a more perfect knowledge of the subject with which the draughtsman was dealing, and of the law bearing upon the different points, than this will exhibits in every part and portion of it. If the framer has

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miscarried with regard to the legality of the subsequent conditions, he has miscarried in very great company, and he would have no reason, if he were living, to be ashamed of any failure. He certainly has miscarried along with the very highest authorities, to whom the greatest deference must be paid. But there is no colour belonging to the trust of an executory trust, properly so called—all trusts are in a sense executory, because a trust cannot be executed except by conveyance, and, therefore, there is something always to be done. But that is not the sense which a court of equity puts upon the term “executory trust.” A court of equity considers an executory trust as distinguished from a trust executing itself, and distinguishes the two in this manner: Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the Court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates? I defy any real-property lawyer to go through this will and draw a settlement, according to the intention of the testator, and yet alter a single word of the limitations for any

[*211] *purpose whatever. They are right from beginning to end. I do not speak now of the legality of the particular proviso, but I am speaking of the framing of the instrument, and I say that no lawyer, sitting down to frame that instrument, could do it more legally or more effectually than the framer of this will has done. I trace the hand of a master in every part of it. There are provisions with regard to vesting the heir-looms; there are provisions with regard to the vesting of chattels; there is a provision respecting his brother's debts, not giving his creditors a right over the fund. In short, in every page, and every part of this will, I see that the framer knew perfectly well what he was about. Now, if he did not know what he was doing, what has he done? He has introduced one of the most perfect series of limitations that the law enabled him to introduce. He has given to the testator's heirs of his body this estate in the first instance. His brother was resident abroad, and there are most elaborate provisions in respect of that residence. He gives him a certain interest, and provides for his heirs male—but how does he provide for them? In the same way in which he provides for the heirs male of other parties. He then makes a provision for Lady Long, who was afterwards Lady Farnborough; and I beg your Lordships' particular attention to these provisions. The learned Judges have begun the will a little

later, but I hold the earlier limitations to be of very great importance, as showing what is the true construction of this will. By his will he gives an estate, after his wife's, in remainder to Lady Long for ninety-nine years; then to trustees in the usual way, in trust to preserve contingent remainders; and then to her heirs male. Now there is a proviso afterwards inserted, that in case she has not issue male living at the time when the estate comes into her possession, then the limitation to her shall cease and be void, and the estate shall go as if she died *without issue. At your Lordships' Bar it was argued as if there was some difference of expression in that proviso as compared with the other provisos; but that is not so. There may be sometimes "determine" in one proviso, sometimes "cease and be void" in another—equivalent words, but the expression is always the same, either "determine and be void" or "cease and be void;" there is no variance in the force and meaning of the expressions. Now, my Lords, just as we are passing, to try the point upon which I am about to enter, namely, what is the true construction of those limitations, and what contingencies you are to introduce, take that particular case. The words are, "To Lady Long for ninety-nine years and her heirs male." I may as well try the case upon the limitations to her as upon those to Lord Alford. A limitation, as we all know, to heirs male, is in its nature and from necessity a contingent limitation, because it only refers to the person who shall be the heir male of the devisee at the death of that devisee; but then it has this singular operation as a limitation, that although it cannot in the first instance operate to the first and other sons, and to them in tail male, but that the first person, the person who is heir male at the death of the devisee, takes it as a purchaser; yet when he does take as purchaser, it has then all the qualities of a regular limitation, and the estate goes from one to another, in precisely the same way as it would have done if there had been a regular line of limitation. And, my Lords, the framer of this will was perfectly aware of that, for in the subsequent clauses, with regard to heir-looms, he speaks of the first and other sons taking. Let us try how we are to remodel the devise, because what the learned Judges propose is this. The limitation is of itself contingent without introducing any single word of contingency, and they propose in the other *limitations, upon which the question properly arises, to introduce from the will new contingencies. They look to the subsequent provisos, and they take from those provisos a particular contingency,

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and they add that contingency to the contingency which is necessarily created and embodied in the very limitation itself. I do not know whether I quite make myself understood by your Lordships, but take this for example: the limitation to Lady Long's heirs male is in itself contingent, because it really is, in point of law, to the person who shall at her death answer the character of heir male of her body. If the learned Judges were to do with that limitation what they propose to do with the subsequent one—finding that in case Lady Long, when she comes into possession of her estate, being in remainder, has not issue male then living, the whole is to be defeated, they would introduce another contingency, and they would say, if Lady Long has issue living at the time that her estate comes into possession, and also at her death. And why would they introduce that? Because they say, that the contingent limitation or use of the estate to her issue was a thing that had not arisen, and therefore, could not be defeated; and although the conditional proviso is that it shall cease and be void, and the estate go over, they say that it is not possible to give that effect to it—they are words and only words—because the estate to heirs male never having arisen, it cannot be defeated; but the will made it a precedent condition that she should have issue male living at the time she came into possession. Now your Lordships will be aware that in the way in which the learned Judges look at this point, with the opinions which they have expressed upon the second point, it is to them wholly immaterial whether this is a condition precedent,—as it is called, and which I will call it also, simply for the sake of following the argument, and not *because it is correct,—or a condition subsequent. What can it signify whether you introduce the contingency before the limitation, which shall prevent the limitation taking place, or you let it take effect *modo et formâ* in which it is given, with a positive, clear, and distinct declaration, that upon a given event it shall cease? Suppose it to vest, where is the magic, where is the harm of its vesting? Suppose it to vest in the person who is heir male, let it vest, in the person who is so for the time, and it is then divested. It is but a momentary operation. My Lords, the law is so benignant in this country that the law sometimes contradicts itself in order to preserve estates. The very doctrine (and I beg your Lordships' attention to this) of conditions subsequent was introduced in favour of men's dispositions, and to save estates which might be prevented from arising by illegal conditions from the destruction which awaited them if the conditions

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were held to be precedent. Therefore, in that view, it is of the greatest importance to distinguish the real nature of that with which we are dealing. I take Lady Long's case, because it is so very simple, and because the estate was to cease upon an event which might happen in her own lifetime, viz., that she might not have issue living at the time the estate came into possession; and if you look at the words of the proviso, you will see that they are clear,—by this the limitation is a contingent limitation. And if you give effect to the will therefore in that respect, you must give effect to it as a contingent limitation to arise at the time of her death. Then there is a proviso which defeats it: now that proviso is strictly proper in all respects, it is a shifting or secondary use, because it defeats the previous limitation, and introduces a new estate in lieu of it. Therefore it is, what, upon the face of the proviso, it purports to be—it is strictly a secondary or shifting use. Why *should you not give effect to it according to the words? You are in this dilemma, which, as I think, my Lords, the learned Judges have in no respect relieved us from, that in this very simple proviso to which I have referred in Lady Long's case, you would have to give to these words a double meaning, that is to say, that, as regards Lady Long's own interest, it was a condition subsequent, as it is termed, and in regard to the issue, a condition precedent. Whereas, if you let this will operate as the framer intended it to operate, so as to let the limitations, if they can, take place according to the manner in which they are given, and then let the other provisos operate in the way in which they by law can operate, and in the manner in which the framer of the will meant they should operate, and as I am bound to suppose the testator himself meant they should operate, they will be defeated if the events arise, and if the events do not arise, they will not be defeated. In this case, there is this most important consideration: if you will let the limitations take effect in their course and according to their order, in the way in which they are pointed out in this will, there are events, and very probable events, in which every one of those uses will take effect exactly as they are given, and not one of them will by any subsequent event be defeated. Are you to introduce contingencies in order to defeat those estates? I think, with the greatest submission, that the learned Judges have not met the difficulty; at least, the learned Judges have not at all relieved my mind from the difficulty when they introduce a particular contingency. Let us see, for example, when we are trying that, what

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the provisions are, and then see whether the learned Judges have or have not solved the difficulty which they have themselves created. After this proviso, as regards Lady Long's estate, you come to the provisoes as to the dignities. The first provides for the *two events, and it has been treated as two provisoes ; it is only one proviso, and the latter part of that proviso overrides the whole of it,—if Lord Alford does not, in his lifetime or within a certain time, obtain the dignity to himself and his heirs male, or if the title of Lord Brownlow descends to him in his lifetime, and he does not, within five years, obtain a proper grant of the dignity, then and in either of those cases, &c.,—that is the proviso ; the latter part of it governs both the preceding provisions, and hence it is only one proviso,—the estate to him, and to his heirs male, and to trustees, and so on, shall cease and determine, and the estate shall go over as if Lord Alford had died without issue. Now just consider that for a moment, while I pass on. Then the same provision is introduced as regards his next brother, Charles Henry Cust, now Egerton, and with this additional proviso, that if Lord Alford shall have obtained a remainder, which would extend to Charles Henry Cust, then that would introduce an additional case ; but supposing he did not, then, and in either of these three cases, the estates, in like manner, are to go over. That is directed in the clearest possible manner. Then come what have been properly called the equivalent clauses ; and I will show your Lordships presently the operation of those clauses, that if the brother of the testator obtains a grant of the dignity, which should extend to Lord Alford, for example, then the gift to the latter shall operate ; or, if Lord Brownlow himself, after the death of the testator's brother, obtains the dignity, that then the devise to Lord Alford shall operate. We shall see presently how that will bear. Then come two extraordinary clauses,—one, that if Lord Brownlow obtains a title which descends and which would interfere with the dukedom or marquise, the limitations are to be void ; secondly, if Lord Alford acquires by himself or otherwise any title (other than the dukedom)

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*the precedency of which shall be greater than the Marquise of Bridgewater would be, that then the estate shall be void. These are two actually distinct clauses, repealing clauses ; I will not stop now to inquire whether they are legal or not, but observe what the learned Judges have done : they have taken, out of this series of complicated provisions, a particular case, namely, that of Lord Alford dying without acquiring the title, and then they

introduce one express contingency upon the contingency which is necessarily included in the devise, and then they make it thus——

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(LORD LYNTHURST : That is only half the devise.)

That is only half the devise, as my noble and learned friend observes, but I will show your Lordships what besides. They take that particular case out, and introduce it without warrant of law, in my opinion, speaking with great deference to them, but certainly against the intention of the testator, and contrary to the frame of this will, they take a particular contingency out and read it thus,—that if Lord Alford should obtain the title of Duke or Marquis of Bridgewater in his lifetime, then to his heirs male at his death. My Lords, I pressed it upon the learned counsel at the Bar, that in order to sustain that view of the case they must be prepared to show how every part of these various provisoes can be introduced by way of contingent event, or precedent condition, if you like to call it so, by a contingency which, unless it happens, shall prevent the use from arising. But to take out that particular case, because the event has happened, is against every construction of law which ought to bind a Court of justice. You are not to look at the case, as it stands, at the moment when you are deciding it, and pick out that particular case, and say, because this event has happened, such a construction is to be put upon it. The true *mode of construing men's wills is this,—take the whole instrument and ask what were the probable cases which might arise at the time that will was made; what were the probable events which were contemplated by the testator and provided for. If we are to do what the learned Judges suggest, no man can introduce contingent limitations with executory limitations over that will satisfy your Lordships; for every event must be provided for by a string of contingencies and qualifications. There is no reason why you are to introduce one contingency—we are now speaking of a contingent limitation—and leave out all the rest. Here the first contingency is, if Lord Alford shall not acquire the title, which provision does not disturb his life interest; but the next contingency is, “if he shall for five years be Earl of Brownlow without acquiring the other title:” that goes to qualify and defeat his own interest. Then we come to the other cases, still keeping to Lord Alford; if Lord Brownlow acquired the title, that is a

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ratification of the devise, and that is a qualification. Therefore, suppose Lord Alford, for example, not to have acquired the dignity, we know that still his issue male might take under the will. But the other conditions must yet be allowed to operate. Why not take them, therefore, in their regular course and order? Supposing the brother himself to have acquired the title, there, again, is a ratification of the devise, and the limitation will take place. But the contingency proposed to be introduced by the learned Judges, in order to effectuate the intention of the testator, according to that view of the subject, would require to be qualified, moulded, and explained in a way that no man ever did intend when he created such a contingency. What would be the consequence? Why, that the framer of this will, who was master of his business, and drew the will in a perfectly legal manner, so as to meet that, and, I will venture to *say, every other contingency, in exactly the manner in which every one, who is really worthy of the name of a conveyancer (a name for which, I can assure your Lordships, I have very great respect), would have drawn that will, must be treated as having overlooked a most material set of circumstances.

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My Lords, I have read over and over again every syllable of this will. I have bestowed upon it the greatest attention in my power, and have felt exceedingly anxious about the determination of it, differing as I do from my noble and learned friend on the woolsack. I do so with great reluctance, when I consider that his opinion is supported by so great a majority of the learned Judges; and it really does require a very strong conviction to enable me to recommend your Lordships not to follow the opinions of those learned Judges. There is not a single proviso throughout this will that is not consistent with itself, and with every other part of the will; and if you attempt to dislocate it, and to convert provisos for cesser into contingencies, you produce all the mischief which I have pointed out, and do that which must lead to inextricable confusion. You may, no doubt, pick out a particular case which has happened, and say that that is a contingency, but you are not warranted in doing so in point of law. If you turn the provisos into contingencies—in effect, conditions precedent,—it would be difficult to manage the gift over “and in default of issue male of Lord Alford.” It has not escaped observation that in every instance the testator has directed the estates or uses to cease in the given events.

My Lords, in this case there seems to have been a little misunderstanding. One learned Judge refers to *Carwardine v.*

Carwardine (1) as an authority for importing words into a condition. Your Lordships will find that *fully explained in a book, which has been already referred to,—the last edition of Gilbert on Uses (2), and you will see that that case does not bear at all upon the present. “A settlement was made to the use of the settler for life—remainder to his intended wife for life, except in such cases as should be thereafter excepted for her jointure.” In a subsequent part of that settlement there was a proviso that if the settler had issue, that issue should have half the estate during the life of the wife; and what the LORD KEEPER did in that case was this,—he introduced that proviso properly, where the exception was, to her for her lifetime, “except in such cases as should be hereinafter excepted.” He said, “Very well, I must look to see what is excepted;” and he took the exception that created a conditional limitation. She had the whole of the estate, if there was no issue living, and if there was issue, then the issue took one half, and she took the other half. That was all that was done in that case. My Lords, one of the learned Barons (Mr. Baron ALDERSON) seems to have imagined that this was a case turning upon the difference between a contingent remainder and an executory devise, for I see that that learned Judge states, “As it is a rule of construction to give words, if they will bear it, the effect of creating a contingent remainder rather than an executory devise, when there is, as here, an estate to support it; this is the construction which, treating these as limitations at common law contained in a will, I should give to them.” I think there is some misapprehension about that. This case involves no consideration of that rule. The very limitation itself is a contingent remainder. We are all aware that it is a contingent remainder, and not an executory devise. A gift is not more or less contingent—a contingency is a contingency. The event upon which the *contingency depends may be more or less probable, but you do not make the contingency more or less contingent. It is contingent, and that is the definition of it. But the event may be much more probable in one case than in another—Is it contingent? It is in point of law. This, therefore, is a contingent remainder, and the only question is, whether it is to be defeated by subsequent events, by a proviso which would operate to create a shifting or secondary use. The learned Judge would extend the rule which applies primarily to the creation of either a contingent remainder or an executory

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(1) 1 Eden, 27; Butl. Fearn, 388.

(2) 3rd ed. by Sugden, 173, n.

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devise, to a shifting or secondary use, to which clearly it is not applicable. My Lords, one thing I think is quite clear,—my noble and learned friend who spoke last, stated that in which I quite agree,—that a condition precedent or a condition subsequent can never be fairly varied or be rendered more or less operative, because a limitation is contingent. It matters not whether the limitation is vested, or whether it is contingent, for the question of condition precedent or condition subsequent depends upon intention; whether the one or the other, whether it be a contingent limitation or whether it be vested, is wholly indifferent to the operation of the rule.

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My Lords, the great question upon this will, will be what I have before stated. If you leave these limitations to operate precisely as they are given, and to be defeated precisely as the testator has provided for their being defeated, every intention which the testator ever had will be carried into effect, according to the rules of law, without altering a single word in the will. You will give to the language its natural import, and, moreover, you will give to the language its scientific and legal import; and it would be doing violence to the words to construe them in any other way. I have already, I think, mentioned to your Lordships that it must be wholly indifferent as to the intention of the *testator, assuming him, as we must, to have considered all the provisions as legal, whether you prevent the use from arising, or whether you will allow it to vest for a moment, and then to be divested. But I will call your Lordships' attention to the care with which the law provides for the vesting of estates to save them from being destroyed. There is a remarkable instance in the old books, the case of *Plunket v. Homes* (1). There the devise was to the testator's heir-at-law for life, with remainder over in contingency, and the fee-simple descended to the heir-at-law, who was then the tenant for life. Now, your Lordships are aware that the union of a fee-simple in reversion, with a life estate, would exclude and destroy the contingent remainder. What did the Court do when that case arose? It decided that, as the descent was immediate to the heir, there should not be that coalition in law between the reversion and the life-estate which would exclude the contingent remainders, although it was admitted to be then the law, as it still is, that if the descent of that reversion had not been immediate, but it had descended to a third party, and from him to the tenant for life, the heir-at-law, the contingent remainders would have been excluded. That, therefore,

(1) 1 Siderf. 47; and see Sugd. Gilb. on Uses, 303, and 303, n. 2.

is an instance in which the law actually intrenches upon its own settled rule, in order to save estates from being destroyed.

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I have reserved, as regards this question, the authorities by which I wish to show your Lordships that, as I apprehend, the opinion delivered by the majority of the learned Judges ought not to be the rule of your decision; and the cases to which I am about shortly to call your Lordships' attention, you will find to be cases which, if the rule now proposed by the learned Judges had been adopted, must have been decided directly in an opposite *way; and yet there are no cases better established in law than those to which I refer. I will first mention a case in which the question was, whether a proviso should operate, by way of condition, to defeat a legal estate, or whether it should operate so as to form a part of the limitation itself, and so save the estate. It is the case of *Page v. Hayward* (1): "Nicholas Searle, by his will, devised to his niece Mary Bryant and the heirs male of her body, upon condition and provided that she intermarry with and have issue male by one surnamed Searle; and in default of both conditions he devised to Elizabeth Bryant (in the same manner); and in default thereof, he devised to George Searle for sixty years, if he so long live, remainder to the heirs male of the body of the said George and their issue male for ever." One of the nieces married a person who was not a Searle, and the question was, what was the effect of those limitations? "And by HOLT, Chief Justice, and the whole COURT it was adjudged, first, that the estate devised to Mary was a good estate tail, and so was the estate to Elizabeth, but it is a special entail; it is an estate to her and the heirs male of her body begotten by a Searle, which is a middle entail, not the highest nor the least; for it might have been to her and the heirs of her body begotten by J. Searle, which had been more particular; yet this is a good estate tail within the Statute de Donis, for it is within the reason of the statute. Secondly, the words 'upon condition,' &c., though they are express words of condition, shall be taken to be a limitation; so it is held in other cases. And HOLT, Chief Justice, said, he saw no reason why they might not be so construed in a deed, though the law had not been carried so far; and so the sense is, if she has no issue by a Searle, upon her death the estate *shall remain over." In that case, there-

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(1) 2 Salk. 570.

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now given, I should understand that it would be read as an express condition, which would defeat the estate instead of allowing it to go as a description of part of the limitation of the estate, so as to save, as far as it might be, the devise in the will.

My Lords, there is a great number of cases which have been decided, where, although actual words of contingency are used, and limitations are introduced by actual words of contingency, yet, from the limitations over, you can come to the conclusion that the testator intended that the devisee before the contingency had arisen should take a vested estate. Those cases, therefore, go infinitely beyond that now before your Lordships, because you are here asked, on account of a proviso providing for a subsequent event, to select a contingency, and to insert it where you do not find it. But the cases to which I am now about to call your attention are cases in which there was such a contingency expressed in the clearest words, and yet entirely upon the ground of the intention, that contingency was not, as here, interpolated and inserted without warrant, but was struck out of the will, and was not considered as a condition precedent, but as a part of the gift over.

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My Lords, the first case is the well-known case of *Bromfield v. Crowder* (1). There the testator devised to A. for life, and after death to B. for life, and at the decease of the two, he gave all his real estate to C., if he should live to attain twenty-one, but in case he should die before attaining twenty-one, then he gave it over. The *Court held that that last taker took the estate at once from the death of the testator; though he was under twenty-one he took a vested estate at once, and the gift over was only to take effect in case he died under twenty-one. The learned CHIEF JUSTICE in stating the opinion of the Court, says (2): "There is nothing in the will to prove that the testator meant the plaintiff not to take a vested estate unless he survived twenty-one; indeed, the true sense of the thing is, that the deviser meant him to take it as an immediate devise in himself, but that it was to go over in the event of his dying under twenty-one. It must be admitted that, according to repeated decisions, no precise words are necessary to constitute a condition precedent in wills; they must be construed according to the intention of the parties; and it would be absurd, considering the various circumstances under which wills are made, to require particular terms to express particular meanings. The apparent

(1) 8 R. R. 805 (1 Bos. & P. (N.R.) 313).

(2) 8 R. R. p. 816 (1 Bos. & P. (N. R.) p. 325).

intention, as collected from the whole will, must always control particular expressions; now the fairest construction that can be put upon this will, independent of authority, is, that the plaintiff took an immediate vested estate on the death of the preceding devisees, with a condition subsequent." My Lords, that case came to this House, and the judgment was affirmed (1); so that there the very contingency was struck out of the will, and a vested estate taken directly contrary to the very words of the will itself.

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That was followed by a case which was very much doubted at the time,—the case of *Doe v. Moore* (2). The only difference between those cases is this, that the case to which I have already drawn your Lordships' attention *was the case of a gift in remainder, that to which I am now referring was a devise at once to "J. M. when he attains the age of twenty-one, but in case he dies before twenty-one," then over; and it was held that there was no distinction in law between the two cases, and that, therefore, the devisee took, although he had not attained twenty-one. The words of contingency are again struck out, in order to effectuate the intention of the testator, and that is directly, as it appears to me, opposed to the opinions of the majority of the learned Judges in this case.

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My Lords, that case being deemed not quite satisfactory, the point was brought before this House in the case of *Phipps v. Ackers* (3). There the case which was stated to the learned Judges was this: "The testator being seised in fee of estates situated in the parish of Wheelock, devised those estates in this manner: he gave those estates to George Holland Ackers when and so soon as he should attain the age of twenty-one years, but in case he should die under the age of twenty-one years without leaving issue, in that case the estates should form part of the residuary estate of the testator, which he gave over to another person; and the question put to the Judges was this, what estate George Holland took in the Wheelock estates;"—and their opinion was, that he took a vested estate. My noble and learned friend who spoke second doubted whether *Doe v. Moore* had been properly decided, yet he did not oppose the decision of this House, and that decision was in favour of the judgment of the Court below, and really sets this point at rest.

There was another case to which I shall now direct your Lordships' attention,—the case of *Aislalie v. Rice* (4). There was a

(1) Stated by Lord ELLENBOROUGH
in judgment in *Doe d. Hunt v. Moore*,
13 R. R. 332 (14 East, 604).

(2) 13 R. R. 329 (14 East, 601).

(3) 57 R. R. 27 (9 Cl. & Fin. 583).
See also 39 R. R. 94 (3 Cl. & Fin. 665).

(4) 18 R. R. 230 (3 Madd. 256).

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devise in that case to the wife, and her assigns *for life, in case she continued single and unmarried, and after her decease, to such persons as she should appoint, by deed or will; and for want of appointment, over. But in case she should marry in the lifetime of other persons, with their consent, then she was to enjoy the estate for the whole of her life. Your Lordships will see, therefore, that the limitation was to her, for her life, if she should so long continue single and unmarried, but with a subsequent proviso, that if she married in the lifetime of the persons referred to, with their consent, she should have the estate for the whole of her life. Those persons died, and she married without consent; and the question was, what was the nature of the limitation? It was sent to the Court of Common Pleas (1), and the learned Judges of that Court returned this certificate: "We are of opinion that this condition was a condition subsequent, and that, as the compliance with it was, by the death of Alice Hatton, and James Tierney, and Thomas Lilly, before the marriage of Hannah Lilly, become impossible by the act of God, her estate for life is become absolute, and that she may now execute the power of appointment;" and that was confirmed. Now if the case provided for had been allowed to operate as a part of the limitation, she would, of course, have lost the estate; but the Court held it to be a condition subsequent, and that the condition having become impossible by the act of God, the estate was not destroyed or affected, but remained: and your Lordships see, therefore, how anxious the Courts have been to prevent estates from being defeated by such conditions.

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There is one other case to which I will call your Lordships' attention,—that of *Gulliver v. Ashby* (2). There, the estate was devised to uses, and there was a condition by way of proviso, that the party should take the name and *arms, but there was no devise over. There was a prohibition against waste, and the particular spot so protected was actually devised over. There was a little argument, therefore, upon that point, but the question was, what was the nature of the proviso as to taking the name and arms? Lord MANSFIELD said, "I am of opinion that this is not a condition precedent, and it cannot be complied with;" and he gives the reasons why he is of that opinion. It was argued very much that that portion of the proviso was to be taken in and form part of the limitation, just as the learned Judges here have recommended your Lordships to take in the contingent proviso and to insert it before

(1) 18 R. R. 230 (8 Taunt. 459).

(2) 4 Burr. 1929.

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the limitation. Lord MANSFIELD was clearly of opinion that that was not warranted by law; and he makes this observation, "as to the question whether the condition was broken or not. In such a case (of so silly a condition as this is)," showing that the Courts do not look with very great favour upon such conditions, "the Court would perhaps incline against the rigour of the forfeiture," though a forfeiture had been incurred. Mr. Justice YATES says, "This is certainly not a condition precedent. The question is, 'whether it be a conditional limitation.' I am clearly of opinion it is not. Doubtless it is not an expressed limitation; and an implication of one can only be made in order to effectuate the testator's intention, and must be a necessary implication to that purpose." He then says, "The Court will not make an implication to support an idle intention beneficial to nobody, nor shall such an implication be made upon a limitation after estates tail." He then says, "It cannot, therefore, be considered as a conditional limitation, nor is it a condition subsequent, for it would be nugatory; as Ambrose Saunders might immediately suffer a common recovery and bar the estate. It can only operate as a recommendation or desire." Mr. *Justice ASTON says, "Whether this be a condition or a recommendation, yet the rules of making implications do not hold in the case now before us. The cases cited in support of making the implication are founded upon reasons which do not exist in the present case. I take it to be a condition subsequent, and as such barred by the common recovery." My Lords, observe what another of the learned Judges said: "He concluded with saying that this condition, or whatever else it may be called, is not such a limitation as will carry the estate over to the next remainder-man upon breach of the condition enjoined." These cases seem to me clearly to prove what I have stated to your Lordships, that not only is the introduction of the contingency selected and culled out of the provisos not warranted by law; but that the law does in cases of infinitely more difficulty actually strike out positive contingencies, and give vested estates in order to effectuate an intention. In like manner, it refuses to take a proviso, the object of which was to impose a condition upon the parties, out of its proper place, and to insert it as a part of the limitation, which would go to defeat the estate. As these cases appear to me quite conclusive upon the subject, I have, therefore, come to the conclusion to recommend to your Lordships, with my noble and learned friends who have already spoken, and I do so with a perfect conviction in my own mind that such is the

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law—to hold that this, if it is to be called a condition, is a condition subsequent, and not precedent. I call it so, because it is a short way of expressing my opinion—not because I look upon the proviso as a condition.

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My Lords, you must, in looking at this part of the case, bear in mind the different events that might have arisen. If Lord Bridge-water's brother had acquired the dignity, and it had descended to Lord Alford, everything would *then have taken place regularly in its course. If Lord Brownlow had obtained the dignity and it had descended, the same operation would have taken place, and the limitations would have taken effect in their natural order, without being in any manner disturbed. The different complications which might take place, I have already referred your Lordships to, and I will not repeat them; but looking at all these points, I am bound to say, as a real-property lawyer, the case is not one upon which I can entertain any doubt. I speak with great submission and deference to those who are more competent than myself to give an opinion upon it, but I am bound to state my clear and firm conviction and opinion, that this is in no respect within any principle of law which authorizes your Lordships to treat it as what has been termed a case of a condition precedent.

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My Lords, that introduces the next question, which has been so very largely debated, that I shall be as short as I possibly can upon that question. I agree with so much that has fallen from my noble and learned friends, that I shall not attempt to repeat what they have already so ably expressed. But there are some few points to which I wish to draw your Lordships' attention. If you take the case of *Kingston v. Pierrepont* (1), as it is reported, it would seem to be a case in which the testator had intended by "lawful means," as he states, to obtain a dignity. But we have been furnished with the copy of an extract from the Registrar's book of that case, by which it appears that he meant no such thing; he meant any means, however unlawful, as I will show to your Lordships. What does that case prove? Remember that this was a will openly made, a will that must necessarily be brought forward, made by a person of great family, and made *with the view of obtaining the highest dignity that could be obtained from the Crown; and which yet did unblushingly provide for the purchase, by money, of the dignity in question. How was

(1) 1 Vern. 5. See *ante*, p. 15.

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that followed up? A bill in equity was filed by the person who claimed to be entitled to have that money laid out in the purchase of the dignity, praying to have the trust executed, that is, to have the dignity bought. What conclusion do I draw from that? That at that period, such was the corruption of the times that nobody doubted that a peerage might be bought. But observe that, that attempt being defeated, nobody has, for 150 years, ever attempted to raise the question again till the Earl of Bridgewater raised it in this case. My Lords, it has often been said by sages of the law, and I think well said, that it is a good rule not to allow that to be done which has never been accomplished. We have had new-fangled schemes quite enough, without introducing more. The attempt at this day to introduce some novel limitation would fail, for you may depend upon it that it would contain some seeds of vice which would render it illegal. The wit of man has been tried, and the science of lawyers has come to his aid, to endeavour to frame limitations to gratify every possible fancy and every possible caprice; but during the whole of the long period to which I have referred there are but two instances, one of which I have mentioned to your Lordships, in which the parties thought they could, in a court of justice, enforce the actual disposition of money to buy a peerage. And the debate was long, as the Registrar's book tells you, before that case was decided. And then this case, for the first time, at the end of upwards of a century and a half, comes before your Lordships upon a similar point. What is the distinction between the cases, in the worst and vilest view of the matter, and looking at the infirmities of human nature? That in the one case it was unblushingly and openly asserted, intended, and expressed; and in the other case, supposing there was any such intention, the means are furnished of accomplishing the very same purpose, and the means furnished with such a pressure upon the man to whom those means are given, that it is too much, it is too great a trial of human firmness, or rather, I should say, of man's weakness, to expose him to such a temptation, and the law ought to step in to save men from such a temptation. What was the object of the Earl of Bridgewater? To annex his estates, as he tells you, to the title of Duke or Marquis of Bridgewater. How did he intend to accomplish that? By giving this immediate vested estate, worth upwards of two millions of money, to a family with influence, possessing already a high dignity, and which would only make it necessary to obtain a step or two steps in the peerage;

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and with such a pressure as that would create, he hoped that it would lead to the acquisition of the dignity. He imposed no such obligation on the Egertons of Tatton. My noble and learned friends have told your Lordships what has been done in former times, and I entirely agree that this case ought to be decided precisely as if it had taken place a century and a half ago. The law moulds itself to the wants and wishes, and varying exigencies of mankind, and properly so ; but the principles of law do not vary, though they may be modified in the application of them to new cases as they arise. The principle of law upon which these cases must be decided is precisely that which ought to have governed this House if the case had come before it at the time when the case of *Kingston v. Pierrepont* was heard in the Court of Chancery. Men are not to be allowed to accomplish indirectly that which they cannot do directly. They may not furnish pecuniary means (for these are illegal means) to a *devisee, which might further his endeavours to procure a peerage ; making the continuance of his interest to depend upon his success. No man should be permitted to hold out inducements which may lead to serious and fatal consequences.

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I think it important, in a few words, to call your Lordships' attention to what was the real nature of the case of *Kingston v. Pierrepont* (1), because it shows how necessary it is to be very careful in any rule laid down not to encourage dispositions of this nature. The will there appropriates "10,000*l.*, to be employed by his brother, the Marquis of Dorchester, and William Pierrepont, both or either of them, or the heirs male of their family at the time of his death, by all best and becoming lawful means, to procure the title of Duke to the present head and successive heirs male of their name and family, provided the same were effected within the term of one year after the day of his decease." He thought that the dignity of a dukedom was to be had very readily, and he only allowed twelve months to obtain it, and 10,000*l.* I beg your Lordships' attention to this part of the will, in order to see what the intention of the testator was. "But if the said sum of 10,000*l.*, or what they, concerned in the title, might or should add, could not avail to that mentioned and appointed end,—the obtaining of the title," then he gives the 10,000*l.* over. So that he says, "If you cannot with that 10,000*l.* obtain the title, my object will not be answered, and I give it over." Then comes this important clause :

(1) 1 Vern. 5. See *ante*, p. 15.

“Further declaring that the said 10,000*l.*, or any part of it, was not to be, nor should not be, in the hands of the carriers on account of the designed procurement, but granted and secured to be paid when the wished title was really procured, and *satisfactory security given to his executor, and that within a short prefixed time, it certainly should.” Your Lordships see, therefore, that he says here that the money is not to be given to the carriers, but it is to be secured well till the title is actually and positively got. The word “carriers” seems rather to have puzzled some persons, but it admits of a very easy interpretation. The word “carriers” there means the persons who should undertake to get the title, and they were not to touch the cash till the ducal coronet descended upon the brow of the person there named. A more unblushing and audacious disposition never was made by man; and that the parties entitled under it should dare to go into a court of equity and ask for the execution of that trust does show a state of things sufficient to alarm us, and it ought to operate as a warning not to let in, by the decision of your Lordships now, such dispositions in effect as that which was then struck at. There the matter remained up till this moment, and I hope that your Lordships will now, by your judgment, give a final and fatal blow to such highly improper dispositions.

I cannot help thinking that there is a great deal in the argument which was addressed to us from the Bar, as to the embarrassment which such a provision as this would create in the Crown. Constitutionally speaking, I will not on this occasion sever the Crown from its Ministers, but I will consider the Crown acting in the usual way, by responsible Ministers. Then observe what it is that is desired. A particular dignity is pointed out, and particular limitations of that dignity are chalked out, and there is this pressure at least put upon the Crown, that a case of compassion is raised. Suppose Lord Alford was an infant when the testator made his will and provided for his infancy. Suppose, for example, the estate to have come to the infant Lord Alford, and suppose Lord Brownlow to *have died, and the Earldom of Brownlow to have descended to Lord Alford whilst he was an infant, then comes the clause that if, within five years, he did not obtain the dignity, his estate should go over to others—an estate worth two millions of money. Now conceive the pressure that is put upon the Crown, the case of compassion which is made out. Will the Crown refuse the dignity to this family? Will it refuse one step more in the peerage, knowing that the consequence of its refusal will be that

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this vast estate will go from the person for whom it was provided in the first instance, and thus the object of the testator's bounty be frustrated. I say, my Lords, that it is an indignity, an insult offered to the Crown, that a man shall point out the particular title which he will have, and the particular limitations to be attached to that title; that he shall prohibit a party from taking any other title which should interfere with his view; that he shall insist upon what the Crown itself cannot accomplish, namely, as in one of the clauses, that the dignity to be taken shall have a certain precedence. The Crown of itself has not the power to do that which this ambitious testator desired to be accomplished. Is the Crown to be placed in that difficulty? Suppose I were to imagine that two Sovereigns had already been compelled, in consequence of this very provision, to refuse a step in the peerage to give effect to this instrument, it would be no great stretch of imagination; and yet what can be more painful, when you look at the great pressure upon the party? It is a dangerous power to be placed in the hands of any man, with such a temptation to use it—a temptation almost irresistible. God forbid that I should say there are not men who could resist it; but the temptation is more than you are justified in laying before a man, more than you are justified in exposing him to. You are not justified in raising so fearful an issue.

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*Look for a moment at the case of the five years; Lord Alford might have died an infant, and the Earldom of Brownlow might have descended upon him with the other dignity not acquired during his lifetime. It is said that this honour is to be acquired by merit, and that this was what the testator looked at. But look at the probable case, that while Lord Alford was an infant, Lord Brownlow might have died, and the earldom have descended to Lord Alford. Lord Alford, being an infant, would have been incapable, of course, of doing any act; he could not have acquired that dignity of Duke or Marquis of Bridgewater by merit, it would have been impossible for him to do so. Then what would have been the position of the Crown? Here is a young nobleman—an Earl—to whom this property has been left, as a child, wholly guiltless of any neglect whatever, belonging to an ancient stock and a noble family, and the Crown has the means, by giving him only one more step in the peerage, to secure to him an estate of 70,000*l.* a year. My Lords, it is a position in which no subject has a right to place the Crown—no subject has a right to play, if I may so say, with the prerogative of the Crown, or to make the prerogative

of the Crown the basis of an arrangement as to his own property. No subject has a right to do so. Dignities ought to come from merit, and from merit alone. Look at the case in another view: suppose Lord Brownlow to die, and Lord Alford to be of age, and that, just then, the earldom descends to Lord Alford. Lord Alford in that case—just come of age, for example, or he might be older—would have five years to acquire the title of Duke or Marquis. How is any man in this country, by fair means, to acquire the title of Marquis or Duke, or any particular title he chooses to chalk out for himself? If the Crown confers the title—the very first act of the Crown is to select the title—the Crown, out of deference and regard to the subject whom it means to ennoble, may desire to be furnished *with certain titles, but the Crown selects the title, the subject is never allowed to select it. He may by grace and favour name a title, but the Crown selects the title, though it may select that which the man may wish to have conferred upon him. Now, my Lords, observe what Lord Alford would have to do in five years, let his age be what it would when the earldom came to him. He must procure a dukedom or marquisate, and this particular dukedom or marquisate, with particular limitations, or the estates are to go over. It is said that the testator did not mean that the title should be acquired by anything but merit. What merit, in five years, could enable any man so to ennoble himself? Is it to be in the senate—is it to be in diplomacy—is it to be in the army or the navy, or in the law? How is he to determine where his services are to be given, or his talents exercised, in order to entitle him in five years to the most distinguished mark of favour which the Crown has it in its power to bestow upon a subject? It appears clearly to me, therefore, that this is not a question turning upon the grace and favour of the Crown, but is a case of a vast estate given to a person in order to feed the posthumous vanity of the testator, that he might die in the belief that his estates would once more be annexed to a Dukedom or Marquisate of Bridgewater, and he, for this purpose, furnished the means, and with them the temptation to exercise them, in order to obtain that dignity.

My Lords, there are just a few remarks that I wish to make upon public policy. I will not add a word to what has been already said by my noble and learned friends, but I will call your attention to what fell from one of the learned Judges (Mr. Justice CRESSWELL) as regards the restraint of trade. That learned Judge says that with regard to the restraint of trade, there is a maxim in common

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law—and he refers to a case in the Year Books (1) *to prove it;—but the learned Judge did not tell your Lordships upon what that maxim was founded. Nobody supposes that there was any statute upon the subject in those times. Upon what, then, was that maxim founded? Why, upon public policy for the good of the realm. It was not good for the realm that men should be prevented from exercising their trades. Now let us see what this particular case is: it lies in a few words, and remarkable consequences have resulted from it. It was an obligation with a condition that if a man did not exercise his craft of a dyer, within a certain town, that is, where he carried on his business, for six months, then the obligation was to be void; and it was averred that he had used his art there within the time limited; upon which Mr. Justice HULL, being uncommonly angry at such a violation of all law, said, according to the book, “Per Dieu,” if he were here, to prison he should go until he made fine to the King, because he had dared to restrain the liberty of the subject. I wish to draw your Lordships’ attention to this case. Angry as the learned Judge was at that infraction of the law, what has been the result of that very rule without any statute intervening? That the common law, as it is called, has adapted itself, upon grounds of public policy, to a totally different and limited rule that would guide us at this day, and the condition which was then so strongly denounced, is just as good a condition now as any that was ever inserted in a contract, because a partial restraint, created in that way with a particular object, is now perfectly legal. Without any exclamation of the Judge, and without any danger of prison, any subject of this realm may sue upon such a condition as Mr. Justice HULL was so very indignant at in that particular case. That shows, therefore, that the rule which the learned Judge, whose opinion is now before the House, thought depended upon some rule of common law, regardless of *policy, was founded upon public policy, and has been restrained and limited, and qualified, up to this very hour, and beneficially so, by that very policy which it is supposed had no bearing at all upon the foundation of the rule.

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My Lords, there has been great discussion about distinctions between wagers and conditions. Certain rules have been laid down by some of the learned Judges, and dissented from by other learned Judges, which I do not mean to follow; I mean particularly in the advice I tender to your Lordships, to guard myself against this;

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I am acting in that advice upon what I consider a great principle of law, and I am advising you to apply that principle to the particular case before you; I strongly advise you to follow the example of my legal predecessors, and not to lay down upon this occasion any abstract rules. Let each case be decided upon principle, let each case as it arises be subjected to the consideration of the Judges, and you will find in that way, taking the example of perpetuities, that a clear rule of law will be formed. If, in the case of perpetuities, this House had attempted, at starting, to fix a limit, and to lay down a certain rule which was not to be departed from, it would have done great mischief, and we should not have had the rule of property acted upon, which we now enjoy. My Lords, one of the learned Judges, Mr. Justice TALFOURD, refers to, and Mr. Baron ALDERSON puts a case about the danger of wagers. He puts the case of a wager on the Queen's life, and, alluding to a wager upon the duration of that life being void, he asks whether a lease upon the Queen's life would not be good. Why, of course it would be good. It has no tendency to mischief. It is rather, generally speaking, meant in honour of the parties whose names are taken. The object is, that the persons who grant leases may, from the dignity of the nominee, know when that life drops; but no *mischief has ever occurred from it; if it had occurred, it would at once have been provided against. But suppose this case, —suppose a devise to one for life, with a proviso that if the Queen was not dead that day six months, the estate should cease. Would not that be an illegal proviso? Of course it would be. And your Lordships have shown by your decision in a case that was decided lately by this House (1), that a Judge with the smallest interest, was incapable of trying a cause, not because anybody supposed that he would be influenced (nobody supposed so), but because the principle is, that a man shall not have an interest in a matter which he is to decide. You must take the general principle. But it is said by the learned Judges, "Yes, that is a principle of law." No doubt it is, but upon what was that principle founded? Does any man doubt that it was founded upon public policy? That is an expression which is well understood. Does any man doubt it? One of the learned Judges who denied that there was public policy in the case of the restraint of trade is contradicted by another learned Judge, Mr. Baron PARKE, who was of opinion that it was founded upon public policy. That learned Judge's opinion I considered as

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(1) *Dimes v. The Grand Junction Canal Co.*, 88 R. R. 330 (3 H. L. C. 759).

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containing within itself the opinions of the great majority of the Judges. My Lords, a case was put by one of the learned Judges of this sort,—that a subject went to the Crown and said, “If the Crown will grant a dignity to such and such a member of my family, I will settle a great estate upon that person.” The learned Judge said that was perfectly legal, and he could not see where the distinction was between such a case and the present. Now I see a very broad line to be drawn between that case and this. It may not be considered a wise thing to do; but clearly it is not illegal. Suppose a great family desires, as often has happened, that the second *son should be made a Peer in order to found a separate family. Nothing could, I think, be more reasonable, when asking upon proper grounds for the favour of the Crown, than to tell the Crown that that dignity would be sustained by a sufficiently ample estate, nothing could be more proper; but there the Crown is not fettered at all; the Crown will accept or reject just as it thinks the party deserving of its favour or not. That is not the case of a man who has left his property in such a manner that he cannot afterwards remedy or alter it, death having intervened. There is no question of that sort in the case suggested,—the man is living, and the Crown does not care how that man may dispose of his property. The Crown would not grant a dignity merely because an estate was to be attached to it; if it did, every wealthy person in the kingdom would have a dignity conferred upon him. That is different from the case now before the House; here we are dealing with the dispositions of a dead man’s property, and we are to consider whether we can or not leave it safely under the rule which he has laid down.

My Lords, one of the learned Judges (Mr. Justice CROMPTON) in giving his opinion to your Lordships, says, that there is no capricious disposition by which, according to the law of England, a man may not leave his property. I believe, my Lords, that is rather too broadly laid down. It has already been shown in the argument, that no man can attach any condition to his property which is against the public good. For instance, the case put in the old books of a man making a condition that his devisee shall not cultivate his arable land. That is void, because it is against the prosperity of the country—and for no other reason. But there are many other dispositions that a man may not make of his property; and I will give your Lordships a few instances. A man cannot alter the usual line of *descent by a creation of his own.

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A man cannot give an estate in fee-simple to a person and his heirs on the part of his mother. Why? Because the law has already said how a fee-simple estate shall descend. This is a case in which he cannot alter it; in which the law does not allow a capricious disposition of property. A man cannot by law give an estate to a private charity; the law would not execute—it is so vague. In the case of *Townley v. Bedwell* (1) Lord ELDON decided against the validity of a gift for maintaining a botanic garden, upon the ground that it was stated to be intended for the public benefit. He thought that was too large, and not within the Statute of Charitable Uses. A man cannot give his property generally to objects of liberality or to objects of benevolence, and I might multiply instances. There are many instances in which the rule admits of exception, for a man cannot indulge in every fanciful disposition of his property. The law of England, however, does this which no other law in the world accomplishes, and I hope your Lordships will, in another capacity, take care not to break wantonly and without consideration into that law. The law of England enables you at once to put your estate in settlement for the purpose of providing for those who are to come after you, and, at the same time, it gives all the rational power of disposition which any man could wish to have vested in him, and which, I believe, no other law in the world accomplishes in so perfect a manner or so well as the law of England. But, my Lords, the law of England knows where to step in and to stop any improper disposition, such as that before your Lordships; and I think that this, therefore, is a case in which the exercise of that power, large as it is given by the law of England, ought to be properly restrained.

My Lords, I wish before I sit down to draw your attention to an authority, and an ancient one, one that has had great influence on the law of England, to show that this doctrine of public policy is authorized by the greatest authority in the law to be applied to a subject like that before your Lordships; that is, a testamentary disposition of property. Putting aside wagers, and putting aside contracts, and involving ourselves in nothing which is not germane to the matter, but taking the actual case of a disposition of property, let us see whether public policy is in this country not strictly within the rules of the Courts, and must not continue to be so according to the decided cases. My Lords, the case to which I invite your attention is the well-known *Duke of Norfolk's case* (2);

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(1) 6 Ves. 194.

(2) 3 Ch. Ca. 1.

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and your Lordships will recollect that that was the first time in which, by way of trust, there had been an attempt to carry over an estate upon a contingency to happen in a lifetime. We should be astonished now to hear it stated, but then the question was, whether you could limit your estate over upon a contingency to happen in the lifetime of a living person. The three CHIEF JUSTICES delivered their opinions, and they were unanimously of opinion that it was against the law; Lord NOTTINGHAM was of opinion that it was in accordance with law, and decreed accordingly. The three Chief Justices were Montagu, North and Pemberton, the second of whom afterwards became Lord Keeper, and upon a re-hearing, he reversed the decree of Lord NOTTINGHAM. The case was then brought to your Lordships' House, and this House reversed the LORD KEEPER's decree and affirmed Lord NOTTINGHAM's decree (1), and it wisely did so. But I would now call your attention to what the grounds were upon which Lord NOTTINGHAM was justified in disagreeing, and had the courage to *disagree, with what was, at that time, such great authority,—the united opinions of the heads of every Court in Westminster Hall,—all of them men entitled to very great attention from their individual learning. In that case, Lord Chief Justice NORTH's opinion was against the validity of the devise, yet he said (2), "I conceive the rules of law to prevent perpetuities are the polity of the kingdom, and ought to take place in this Court as well as any other Court." So that the LORD CHIEF JUSTICE thought that the policy of the kingdom, which was observed in every other Court, ought to be observed in the Court of Chancery. Lord NOTTINGHAM, upon the first argument, made this observation (3): "Pray, let us so resolve cases here that they may stand with the reason of mankind when they are debated abroad. Shall that be reason here that is not reason in any part of the world besides? I would fain know the difference why I may not raise a new springing trust upon the same term as well as a new springing term upon the same trust; that is such a chicanery of law as will be laughed at all over the Christian world." And upon a subsequent argument (4) he said, "If there be a tendency to a perpetuity, or a visible inconvenience, that shall be void for that reason." He says again (5), "No man can say that it doth break any rule of law,

(1) 3 Ch. Ca. 54.

(2) *Id.* 20.

(3) *Id.* 33.

(4) *Id.* 48.

(5) *Id.* 49.

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unless there be a tendency to a perpetuity or a palpable inconvenience." He then says (1), "If, then, this be so, that here is a conveyance made which breaks no rules of law, introduceth no visible inconvenience, savours not of perpetuity, tends to no ill example, why this should be void, only because it is a lease for years; there is no sense in that." Then he was asked what bounds he would put. It was thought that he was going to a vast extent in allowing a contingency upon a life in being, that must take place upon *the dropping of a life in being, and he was asked where he would stop, where were the bounds? and he answered (2), "You may limit, it seems, upon a contingency to happen in a life. What if it be limited, if such a one die without issue within twenty-one years, or one hundred years, or while Westminster Hall stands? 'Where will you stop, if you do not stop here?' I will tell you where I will stop,—I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee-simple upon a fee-simple are not yet determined; but the first inconvenience that ariseth upon it will regulate that." So that your Lordships will see that the question was precisely germane to this. The question was by law, how far was the limit? and Lord NOTTINGHAM, against the united opinions of the other three Judges, went further than ever had been gone before, and he did it upon grounds of public policy. He was asked "Where will you stop?" and he said, "I will stop wherever I find a visible inconvenience." Succeeding Judges have gone on, and now the rule is, that you may take a life in being, and twenty-one years after that life; and that clearly shows how sound the principle of Lord NOTTINGHAM was, and how wisely it has been extended. The Judges have had no difficulty in stopping,—and why did they stop? Because they found inconvenience. The principle of the law did not allow the tendency to perpetuity, and when a limitation had that tendency, they stopped at it. So here, these provisoes are the subject of limitation, and you have to construe and mould them, if you can, so as to meet that principle in the law. If you find that they are not capable of being so dealt with, you must strike at the root of them, and upon what ground? Upon the ground of public policy. Why should not grounds of public policy be applied to limitations of this *nature as well as to limitations of another, namely, in perpetuity? it being important that you should not allow vague and vain limitations to be inserted in the will of a testator.

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(1) 3 Ch. Ca. 51.

(2) *Id.* 49.

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My Lords, I shall conclude with this one observation: I pray your Lordships to bear in mind, if you permit this mischief now to be introduced, what the bearing of it is, and where it will stop. You might not hereafter be able to stop it, because a visible inconvenience came, for if you permit this to pass where the inconvenience is so visible, you could not stop any other disposition. My Lords, men's minds are prone to embrace precedents, and to graft upon them new-fangled schemes. If your Lordships decide this case according to the opinion of the majority of the learned Judges, no man is wise enough to predict where the mischief will stop. I ask you to consider, if there should be, as there probably would be, a considerable number of landed proprietors, each attempting to raise a dignity attached to his own private estate, embarrassing and entangling the Crown, and embarrassing and perhaps leading into mischief the Crown's advisers, how the Crown would deal with the circumstances, and how the law would stand with respect to that which would become a public mischief. Your Lordships ought to strike at this disposition, upon the ground, and upon the ground alone, that it is necessary to do so for the sake of public policy.

On these grounds I have to advise your Lordships that upon the first point there is no condition precedent, and that no such words can be imported by law as the learned Judges have advised your Lordships to import into the limitation. And upon the other point, that the condition subsequent, if it be a condition, is illegal, and therefore void, and consequently the decision of the Court below must necessarily be reversed.

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My Lords, although I have the misfortune still to retain the opinion which I originally entertained, differing from that which has been expressed by the four noble and learned Lords who have addressed you, yet I do not feel it inconsistent with my duty, or with my respect to your Lordships, to state that it is not my intention to give in any detail the reasons for that difference; and I abstain from doing so on this ground. Four of your Lordships have stated, at great length, your reasons for thinking that the judgment ought to be reversed. My Lords, without making any distinction, such as is made in practice, though not in the theory of the Constitution, between those noble Lords who are called Law Lords, and other noble Lords, and assuming that all noble Lords might equally give their opinions and votes upon this question, as

upon every other, yet I may, I think, assume that no Peer would think fit, upon a question of this sort, to give his vote, who has not heard the whole of the arguments. There being only the four noble Lords to whom I have already alluded, besides myself, who have heard the whole argument, I may assume that your Lordships will only have to decide between the views of those four noble Lords and my own; and that, in fact, the four noble and learned Lords who have addressed the House have decided, or will decide, the question. If, however, I had been in the position of any one of those noble Lords,—that is, if the question had come before me now for the first time,—I should, although differing from them, and though my difference would be unimportant, have felt myself called upon to state in detail the ground of that difference of opinion. But inasmuch as this is an appeal from a decree made by myself, and inasmuch as the grounds upon which I pronounced that decree *are before your Lordships, fully stated, in print, being printed from my own manuscript, I do not think it is necessary that I should repeat what is already there stated. Whatever may be the demerits or the errors of that judgment, I am perfectly satisfied that I have not to accuse myself of having come to the conclusion at which I arrived, hastily, and without the fullest deliberation. I did give to the case my fullest attention; and the result of it is before your Lordships. My Lords, I think I know myself well enough to be able to say that, if my opinion had been shaken by the arguments which I have heard, I should have had no hesitation in stating at once that I had changed my opinion; and I should have made that admission the more readily because the circumstance of the great, I might almost say overwhelming, majority of the learned Judges who heard the case having concurred in the view which I take, would have relieved me from anything like a sense of false shame if I had been convinced of any error. My Lords, it may be that it is difficult to change one's opinions, or it may be from other causes; what the causes are, I do not stop to inquire; but, in fact, I do retain the opinion which I formed at the original hearing of this case, and which is expressed in print as shortly and clearly as I was able to express it. Therefore it is that I do not think it will be necessary,—I might almost say, respectful to your Lordships,—to read over to you again that which you have already read, or to put in different language that which I have already stated in the best language I could command to convey my meaning; and consequently I simply say that I adhere

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to my original opinion. But there are one or two points which have occurred, partly in the course of the arguments, partly in the opinions of the learned Judges, and partly in some expressions which have fallen from your Lordships in the course of what you have stated to-day, that do *induce me to make one or two observations, and they shall be of a very limited character. In the first place, I certainly felt in the course of the argument that perhaps I had been wrong in the use of the word "condition." I did not mean to use it in the technical sense of a legal condition, as connected with the creation of an estate in lands, but in the sense in which we use it when, speaking of common-law pleadings, we say all conditions precedent must be averred. I thought the word condition expressed my meaning with sufficient accuracy, and I shall, for convenience sake, continue the use of it at present, assuming the justice of what has been said, that it is not, strictly speaking, a legal condition. But call it a contingent limitation, or a contingency, or give it what name you please, I think it is to be governed by the same considerations. Now certainly nothing that I have heard, either in the arguments at the Bar, or from the four noble Lords who have addressed your Lordships, has at all (I speak with submission and diffidence, differing from such high authorities) shaken me in the opinion that this is in that sense a condition precedent. It is said that that could not have been the intention of the testator. My Lords, in my opinion it is not a question of intention at all; whether a certain contingency operates as a condition precedent or as a condition subsequent is something collateral to the intention, and not dependent upon it at all. My opinion would not have been shaken if the will had said, "I mean all this to operate as a condition subsequent." Why? I take it, in deciding whether a condition is subsequent or precedent, what we are to look at is, to see the way in which the contingency is to operate, and if it is something which is to happen one way or the other, before that which is contingent upon it can be decided, that is in the nature of things precedent.

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Now can there be the least doubt that the testator meant *(I collect his meaning only from the words of his will) that if Lord Alford, dying in the lifetime of his father, had not, at his death, obtained the required dukedom or marquissate, Lord Alford's son at his death should not have, and Lord Brownlow's next son should have, the estate? This seems to me, after all that has been said, to be a proposition utterly incontrovertible. And to say that such

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a proviso shall operate as a condition subsequent, if it is in the nature of things a condition precedent, seems to me confounding that which is the subject-matter of intention with that which is not, and cannot be, the subject-matter of intention at all.

My Lords, let me put this case: Suppose Lord Alford had survived his father and had become Lord Brownlow, and had then lived for five years, and the question of the operation of the proviso had afterwards come into discussion, and suppose that in this will the testator had said, after the proviso, in that case defeating the estate, "I intend that proviso to operate as a condition precedent," I should wholly have disregarded that statement. I should have said, What can be meant by its operating as a condition precedent? It is in its nature a condition subsequent, and therefore all the rules that attach upon conditions subsequent will be applicable to it, although the testator has chosen to call it a condition precedent. I think that exactly the same principle applies in the opposite direction. No doubt very ingenious arguments have been adduced to show from the terms of the will that the testator meant this to operate as a condition subsequent. I cannot believe that any such thought ever crossed the mind of any testator. The testator does consider how his property is to go, but whether it is to go by one rule of law, or by a condition of one character or another, never crosses the mind of any testator. It is something altogether beside intention.

My Lords, my noble and learned friend who last addressed *your Lordships adverted to the case of *Phipps v. Ackers* (1), and many cases of that sort. The Courts have in those cases got over contingencies, and have made violent struggles to get rid of them, and have treated the will as if it had been worded differently from its actual wording. The Courts in those cases have seen, or have thought they saw, an intention in the testator which would be defeated by the use of the words in the way he has used them,—they have got over the use of words, in order to carry into effect the supposed intention. But in this case nobody surely can doubt what the intention of the testator was; and if it was a lawful intention, it will be defeated by the course which your Lordships are about to take.

Let me ask your Lordships to try the question, whether this is a condition precedent or subsequent by this test. One of the learned Judges (Mr. Baron PARKER) in his opinion says that you cannot, in

(1) 39 R. R. 115 (3 Cl. & Fin. 665, 702); 57 R. R. 27 (9 Cl. & Fin. 583).

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trying this condition by any suggestion, bring it to the test of special pleading, because in actions of ejectment there is no special pleading; but it occurred to me to suggest this case to your Lordships,—I will suppose an action of covenant. I do not profess to be a very expert special pleader, but I think this is a matter so much in the substance of the case that I cannot be wrong in what I am about to suggest. It is a well-known rule that all conditions precedent, using the word “condition” in rather a loose sense, must be averred by the plaintiff upon his declaration; whereas a condition subsequent, which defeats a previously acquired right, need not be alluded to by the plaintiff,—it must be set out by the defendant. Let me suppose an action of covenant, and the declaration of the plaintiff to state that the defendant, by his deed under his hand and seal, covenanted with the plaintiff that he would pay to J. S. during the life *of J. S. an annuity of 100*l.*, and would, after decease of J. S., pay to such person as should then be heir male of the body of J. S. a like annuity of 100*l.*, by half-yearly payments, the first payment to be made at the end of six calendar months next after the decease of J. S. Provided always, that if J. S. should not in his lifetime acquire the title of Duke of Bridgewater, then the said annuity so payable to the heir male of his body should cease and be void. And that in such case it should be payable to X. Y. for his life, and after his death to such person as should be heir male of his body, with a like proviso in case X. Y. should not acquire the title of Duke of Bridgewater. The declaration I then assume shall go on to state that the defendant, during the life of J. S., paid him the said amount as it from time to time became due; that J. S. died on the blank day of blank, leaving J. N. his eldest son and heir male of his body; and though more than three years have elapsed since the death of J. S., and though J. N. is still alive, yet defendant has not paid to J. N. the same amount, or any part thereof, to the damage, &c. Demurrer by defendant for want of averment that J. S. had in his lifetime acquired the title of Duke of Bridgewater. Are your Lordships prepared to say that that would have been a bad demurrer? In a matter of this sort it may be a little dangerous to speak off-hand with very great confidence, but I am strongly of opinion that that would have been a good demurrer. And I am not at all inclined to think that it would have been rendered a less good demurrer if the deed had expressly stated that the condition should operate as a condition subsequent. The

question would have been no more affected by the declaration of the intention of the parties than if they had said, "It shall operate as a fine or a recovery," or anything else. The question would have been, was it intended that J. N., and the heirs male of his body at the death of J. S., should *take any part of that annuity unless J. S. had obtained the dukedom in the lifetime? In my opinion, it would be necessary that the obtaining the dukedom should have been averred. Perhaps it may be said that this form of putting the question is only *idem per idem*. It is exactly this case, and if it does not illustrate my meaning, I must then only fall back upon the reasons I have given in the judgment which is now in print, and must leave your Lordships to consider my attempted illustration as not adding to the weight of the reasons I there gave.

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My Lords, if I was right in thinking that the condition in this case was a condition precedent, the other question substantially does not arise. It might arise in certain contingencies, but I do not think it necessary for me to go into that question. I have stated my grounds for thinking that there was nothing in the nature of the proviso which this House or any court of law could deal with as being void upon grounds of public policy. I shall not repeat the reasons which I have stated: this subject of public policy is always exceedingly difficult to deal with. Lord NOTTINGHAM, in dealing with the doctrine of perpetuity, thought that a limitation tying up an estate for a period not exceeding a life in being and twenty-one years afterwards, was good; that limitation has been adopted and acted on; but it would be a very dangerous thing now to say that, in deciding a question of perpetuity, we should be governed, not by any fixed rule, but by what we might consider to be public policy, that we should extend or narrow the period until practical inconvenience was felt. I only wish your Lordships had been called on to decide the Thellus[s]on will, for I protest that, to my mind, whatever inconvenience arises on grounds of public policy as applicable to the proviso here, I think that public policy was thwarted in a tenfold degree by Thellus[s]on's will. The object of that will was to keep mankind out of *the enjoyment of an enormous sum of money, which, according to the calculation of actuaries, might have amounted to many millions before anybody should enjoy any part of it or more than a small portion of it, to keep everybody out of the enjoyment of it for a period of some sixty or seventy years. The Court said there was nothing in the

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law to prevent it; but that it was contrary to public policy is proved by the fact that in the very next year the Legislature interfered to prevent anything of the sort happening for the future.

[Lord CRANWORTH again explained (1) that he had given full consideration to the case as Vice-Chancellor, although it was stated by counsel on both sides that it would be taken to the House of Lords in any event, and Lord BROUGHAM accepted this statement with some complimentary observations.]

Decree reversed with directions. Costs of all parties to be paid out of the estate.

1852.
Dec. 13, 14.

EDEN v. WILSON.

(4 H. L. C. 257—292.)

[This was a question upon the construction of a particular clause in a will which turned exclusively upon the special context of the clause, and did not involve any general principle of construction or any other matter which appears to have any useful application to any other case. The same question had been considered in 11 Beav. 289, 1 Ex. 772, 14 Q. B. 256, and 12 Beav. 454; but it is a totally different question from several other points reported under the title of *Wilson v. Eden* in 11 Beav. 237 (see 83 R. R. 153), 82 R. R. 855 (5 Ex. 752), 88 R. R. 667 (18 Q. B. 474), 14 Beav. 317 (see 22 R. R. 118), and 16 Beav. 153.—O. A. S.]

1853.
March 17, 18.

Lord
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RUSSELL v. DICKSON (2).

(4 H. L. C. 293—312; S. C. 17 Jur. 307; affg. 2 Dr. & War. 133.)

Legacies given to the same person by different testamentary instruments are *primâ facie* cumulative, but the rule may be excluded by slight indications of a contrary intention in the later instrument.

A testator gave by his will, "To my natural or reputed daughter, M. S., 2,000*l.*, for her own sole and separate use, the interest thereof, at five per cent., to be expended on her education;" and intrusted the care and charge of her to his brother. In a codicil, executed five years afterwards, he said, "I add 3,000*l.* to the 2,000*l.* to which M. S. is entitled under my will, by which she becomes entitled to 5,000*l.*" In about a year afterwards, and about ten days before his death, he executed a further testamentary paper described and published as a will, in which he said, "Not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds with the sum of 20,000*l.* for

(1) See p. 16, above.

(2) *Wilson v. O'Leary* (1872) L. R. 7 Ch. 448, 41 L. J. Ch. 342, 26 L. T. 463; *Kirkpatrick v. Bedford* (1878)

4 App. Cas. at p. 109; *Hubbard v. Alexander* (1876) 3 Ch. D. 738, 45 L. J. Ch. 740, 35 L. T. 62.

my daughter, M. D.;" in this instance giving her his own name, as if she was a legitimate daughter:

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Held, affirming the decree of the COURT below, that there were circumstances here to rebut the *prima facie* presumption in favour of the last legacy being treated as additional, and that it was only in substitution for the sums previously given.

STEPHEN DICKSON, late of the city of Dublin, by his will, dated the 20th of August, 1833, devised all his property, of what nature and kind soever, to trustees, in the first instance to pay all his debts and legacies, &c., and after payment thereof, in trust for several legatees; and then the will proceeded thus: "I give to my natural or reputed daughter, Mary Sheean, 2,000*l*., for her own sole *and separate use, the interest thereof, at 5*l*. per cent., from the time of my death, to be expended on her education, which I wish to be continued at Bristol, or somewhere in that neighbourhood: the care and charge of her I intrust to my brother, the Rev. Richard Dickson," whom he afterwards appointed one of his executors.

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The testator made a codicil to his will (executed avowedly as a codicil), dated 17th August, 1838, which, after several devises and bequests, proceeded as follows: "I add 3,000*l*. to the 2,000*l*. to which Mary Sheean is entitled under my will; by which she becomes entitled to 5,000*l*."

The testator made a second codicil to his will (which, however, in the execution thereof, was called his "last will and testament"), dated 12th August, 1839; but did not thereby refer to Mary Sheean. But a third codicil, dated 4th September, 1839, was in the following terms: "Not having time to alter my will, and to guard against any risk, I hereby charge the whole of my estates and property in the funds with the sum of 20,000*l*. for my daughter Mary Dickson, subject to the limitations and restrictions in my will contained as to the marrying, with consent, &c., of my brother Colonel John Dickson and my brother the Reverend Richard Dickson" (1). It concluded thus: "Signed, published, and declared by the said Stephen Dickson, as his will, in our presence, this 4th day of September, 1839."

The testator died on the 18th of that month, and all three papers were admitted to probate.

Mary Dickson, about whose identity no question was raised, married Richard Russell, and received the sum of *20,000*l*., which

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(1) There was nothing in the will relating to the consent of the testator's brothers as to the marriage of Mary Dickson; but she did, in fact, obtain their consent to her marriage.

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was disposed of in her marriage settlement in the following manner. Richard Russell received the sum of 3,000*l.* for his own use, 1,000*l.* went to pay legacy-duty, and the remaining 16,000*l.* were vested in trustees for the separate use of Mary Dickson for life, and for the issue of the marriage; and it was arranged that if the further sum of 5,000*l.* should ever be paid, 4,000*l.* of it should be vested in the trustees for the purposes of the settlement.

On the 8th December, 1840, Richard Russell and Mary his then wife filed a bill in the Court of Chancery in Ireland against the executors of her father's will, praying that she might be declared entitled to the 2,000*l.* and 3,000*l.* given in the will and the first codicil, in addition to the sum of 20,000*l.* given her in the third codicil. On the 7th February, 1842, a decree was made by Lord Chancellor SUGDEN, by which this bill was dismissed, his Lordship being of opinion that the 20,000*l.* given by the third codicil were in substitution of the two former sums. As the testator had himself created the difficulty, the costs were ordered to come out of the residuary fund.

During the pendency of this suit, but before the decree was pronounced, a daughter, Mary Elizabeth Russell, was born, and on the 28th November, 1846, a new suit, in the names of Mary Russell the mother, and Mary Elizabeth Russell the daughter, was instituted by their next friend in the Court of Chancery in Ireland, with the same prayer as the former. On the 23rd December, 1847, Lord Chancellor BRADY made a decree dismissing the bill, with costs. This was the decree appealed against.

Mr. Rolt and Mr. Bagshawe, for the appellants, [cited *Hurst v. Beach* (1), *Suisse v. Lowther* (2), *Lee v. Pain* (3), *Rock v. Cullen* (4), *Mackenzie v. Mackenzie* (5), *Wordsworth v. Wood* (6), and other cases] :

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There is not in this case one of the circumstances of substitution. The gift is not of the same sum; nor, after the changes in the name and condition of the legatee, can it be said to proceed from the same motive.

The *Solicitor-General* (*Mr. Bethell*) and *Mr. Giffard*, for the respondents, [cited *Fraser v. Byng* (7), and contended that, as the

(1) 21 R. R. 304 (5 Madd. 358).

(2) 62 R. R. 170 (2 Hare, 424, 430).

(3) 67 R. R. 41 (4 Hare, 201).

(4) 77 R. R. 224 (6 Hare, 531).

(5) 26 R. R. 64 (2 Russ. 262).

(6) 48 R. R. 191 (2 Beav. 25; 4 My. & Cr. 641; 1 H. L. C. 129).

(7) 32 R. R. 154 (1 Russ. & My. 90).

testator here stood *in loco parentis*, the rule against double legacies applied: *Osborne v. Duke of Leeds* (1) and *Powys v. Mansfield* (2). They distinguished *Mackenzie v. Mackenzie* (3). They also cited *Kidd v. North* (4), *Moggridge v. Thackwell* (5) and other cases.] Here the intention is clear. The testator would not have needed time to alter his will, if he had merely intended to make an addition to it; and if the instruments executed by the testator are all looked at, it is plain that the last thing he called his will contained all that he intended should be so treated.

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Mr. Rolt, in reply, [distinguished *Currie v. Pye* (6), where there was a gift of a sum of money and a gift of a picture, and these gifts were repeated almost in the same terms by the two instruments. There it was observed that the testator must have intended one as a substitution for the other, for the same picture could not be given twice over, and it was impossible to divide the sentence and to say that the picture was given once, but that the money was given twice.]

THE LORD CHANCELLOR (LORD CRANWORTH):

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This case comes before your Lordships under somewhat unusual circumstances. It was originally brought before my noble and learned friend (Lord St. LEONARDS), when he was Lord Chancellor of Ireland, in the year 1842, upon a bill filed by the husband and wife, claiming the sum of 5,000*l.*, in addition to the 20,000*l.* which they had already *received. The case was determined against the claim. That decree was acquiesced in at the time, but a child was afterwards born, the funds bequeathed had to be settled, and the child and the mother, by her next friend (the husband not then joining in the suit), filed a new bill, alleging the improper constitution of the original suit, and claiming exactly the same rights as had been claimed by the mother in the former suit. The case came on to be heard by the Lord Chancellor of Ireland who succeeded my noble and learned friend, and was disposed of in the year 1847. The matter was argued very fully before him, and considered by him, and he came to the same conclusion at which my noble and learned friend had arrived in the former suit. He was of opinion, as his predecessor had been, that there was no claim on the part of

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(1) 5 R. R. 74 (5 Ves. 369).

(4) 78 R. R. 32 (2 Ph. 91).

(2) 45 R. R. 277 (3 My. & Cr. 359).

(5) 2 R. R. 140 (1 Ves. Jr. 464).

(3) 26 R. R. 64 (2 Russ. 262).

(6) 17 Ves. 462.

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these parties to more than 20,000*l.*; in other words, that the sum of 20,000*l.* was a substitution for the two legacies of 2,000*l.* and 3,000*l.*, and not an addition to them.

I do not at all mean to dispute the principle, neither do I apprehend my noble and learned friend questioned it, that where a legacy is given to the same party in each of two different instruments, a will and codicil, or two codicils, *primâ facie* you must treat them as two gifts. That is an obvious proposition. If the party has twice said he gives, he must be understood to mean to give twice; but of course there may be circumstances to show that the *primâ facie* construction is not, in the particular case, the construction to be adopted. What the circumstances are that are sufficient to outweigh the *primâ facie* presumption, is extremely difficult to be determined by any rule of *a priori* reasoning. Very small circumstances have sometimes been acted on as sufficient to take the case out of the general rule. Some were adverted to in the argument before us; some were treated as too small to be considered worthy of notice by *Mr. Rolt* in *his reply; but they struck my mind as being very important, and such as could leave no doubt upon it. Where, for instance, there was a legacy of 1,000*l.* given by two successive codicils, and it was in each case coupled with the gift of a picture, such a legacy could not be meant to be a cumulative legacy; it was only one thing, and therefore, though money was associated with the picture, the two papers were held to create only one gift. There are many other cases which have passed on that principle.

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The question here is, whether there are circumstances to show that the sum of 20,000*l.* given by the codicil of 1839, was a substitution for the 2,000*l.* given by the will, and the 3,000*l.* given by the codicil, or was an addition to them. The rule I have before mentioned is contended for here, namely, that the third codicil, giving the 20,000*l.*, must be taken to give that sum as an addition to the 2,000*l.* and the 3,000*l.* previously given by the will and codicil. Is there anything in this case to make that rule applicable, or to take it out of its operation? My Lords, I have arrived at the conclusion at which my noble and learned friend opposite and the present LORD CHANCELLOR OF IRELAND have arrived, that there is something to take this case out of the application of the rule I have mentioned. I do not pay much attention to the distinctions that have been relied on by the counsel at the Bar. The way the matter stands is this: by the will the testator gives 2,000*l.* "to my natural

and reputed daughter, Mary Sheean, for her own sole and separate use." Then by a codicil, five years afterwards, he says, "Add 3,000*l.* to the 2,000*l.* to which Mary Sheean is entitled under my will, by which she becomes entitled to 5,000*l.*" Then comes another instrument, which is not in the form of a codicil, but which is published as his last will and testament. It is not material to this case, as it relates only to the disposal of estates purchased since he *executed his will. Then comes the codicil in question, which is truly and in point of law a codicil, though it is not in terms one, being likewise declared to be signed and published as a "last will." The testator died a few days afterwards. What are the words he here uses? (His Lordship read them.) He entirely mistakes as to the fact that there had been nothing in the will about her marrying with the consent of her uncle; there had been something which he probably thought had reference to that matter, but which really only related to placing her at school with the consent of the uncle, though having no doubt forgotten what it was, he imagined it to be a restriction as to marrying without his consent.

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I do not pay much attention to the circumstance that this instrument is not called a codicil, but is published as his will; and the reason is, because the preceding codicil had been signed and published in the same way. I pay, therefore, little attention to that, as indicating any difference in this last instrument, but it is not wholly to be disregarded. There might have been a reason for his doing that in the preceding codicil. It may be that that was intended to be described as his will, not merely as a codicil to his will, in order to show that it was meant to be a distinct and separate instrument, relating to a distinct and separate property dealt with in that instrument alone; and as that property was a newly-purchased estate of freehold, he might desire to deal with it in a separate instrument which should go with the muniments of that estate. There is really very little in that. What does appear to me to be of importance, as distinguishing this last codicil from that which preceded it, is this, that it begins, "Not having time to alter my will," which I interpret to mean, "not having time to alter the whole of my will, to reconstruct and remake my will over again, but intending to do so, and desiring to guard *against any risk, I do it *quoad* my natural daughter, whereby I charge the whole of my estates and property in the funds with 20,000*l.* for her." I take the testator to mean this; "I have not time to do that which I should wish to do if I had more

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time, namely, to make a new will altogether, and in that sense to alter my will; not having time to do that, I do however alter it to this extent, so far as it relates to the interests of my natural daughter. I alter it in this way, that I charge my property with 20,000*l.* for her." That appears to me to be an alteration in the strict sense of the words, and cannot be an addition, and therefore, upon that ground, it appears to me the parties who claim the 5,000*l.* in addition to the 20,000*l.*, claim something to which they are not entitled; and consequently, that the only decree that we have to deal with, namely that of 1847, was quite right in dismissing the suit, and must now be affirmed.

LORD ST. LEONARDS :

I agree with my noble and learned friend, that the decree of the COURT below must be affirmed.

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When the case first came before me in Ireland, it was one on which I never was able to entertain the slightest doubt. The testator had a natural daughter. By the first testamentary instrument he gave to this child the sum of 2,000*l.*, describing her "as his natural or reputed daughter, Mary Sheean," not by his own name, but by the name, probably, of her mother, and, so described, he gave her 2,000*l.* for her own sole and separate use. The interest of 5*l.* per cent., to be added from the time of his death, was to be expended on her education, which he wished to be conducted at Bristol, or somewhere in the neighbourhood; and he gave the charge of her to his brother. As she advanced in years, by another codicil (for he made these *codicils from time to time), he expressly added a bequest of 3,000*l.* to the one of 2,000*l.*, to Mary Sheean, calling her his daughter, by which she became, as he says in the codicil, entitled to the sum of 5,000*l.* Up to that time he was treating her, therefore, simply in the character of his natural daughter. In the second codicil he says, "I add" the sum, which is not an immaterial circumstance, because it shows that when he meant addition he knew how to express it; but up to that time he did not acknowledge her as his legitimate daughter,—he could not certainly make her legitimate by any acknowledgment of his,—but he did not adopt her into his family. In the second codicil he does not even state that he considers her as his daughter. As far as the facts appear, I collect that he must have been in a dangerous state of health when he made his last codicil: it was made on the 4th of September, and he died within ten days afterwards. He calls

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it a will, and a partial will it is, but that explains the circumstance of his anxiety to alter,—for he meant to alter that which he had already done. The words are these—(his Lordship read them). Without looking to any rule of law, I am now merely seeing what was his intention. Finding the hand of death near him, and having in a measure stigmatized his daughter by calling her his illegitimate daughter, he meant to place her before the world, as far as he could, in the situation of his actual daughter; he adopted her, and acknowledged the relation in which she stood to him, without anything painful to her or to those who might become connected with her, from his description of her. How differently was she treated. She was then treated as a daughter. He was a man of considerable property, and instead of giving her 2,000*l.*, as he had done in the first, and 3,000*l.* more, as he had done in the second codicil, he gives her 20,000*l.* at once, charged upon the whole of his property. What, then, was *the change of intention? While he treated her as an illegitimate child, he gave her the portion of an illegitimate child; when he adopted her into his family, and acknowledged her before the world as his daughter, he meant to place her in the situation of his daughter, and gave her what might be considered for any young lady a very considerable fortune, he gave her 20,000*l.* Could he imagine that his daughter, whom he thought he had honoured by placing her before the world as his daughter, would fall back on the disagreeable description under which she would be found mentioned in the will and the first codicil, and would after his death come forward and say, “First, I come as Mary Sheean, the natural daughter of the testator; pay me the 2,000*l.* and pay me the 3,000*l.* ;” and then, after she has received that, say, “Now I come in the character of Mary Dickson, the acknowledged daughter of my father; pay me the 20,000*l.* ?” It would be rather singular to see her giving receipts for these different legacies, one in the name of Mary Sheean, as the illegitimate daughter, the other in the name of Mary Dickson, the legitimate daughter; and if anything could have disturbed this gentleman in his grave, it would have been the notion that the young lady ever would have set forth such a claim as she has attempted to establish in the different stages of this cause.

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It appears to me,—I am now speaking simply of the intention,—that there could be no doubt about the intention of the testator. He says, “I have no time, death is pressing heavily on me, I want to alter my will, but I will not run the risk of altering my

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will." Does any man believe that if he had run that risk, he would have repeated those legacies which he had given to her as his natural daughter? Every man of common sense knows that no such thing would have taken place. Can any man believe that, if he had been able to frame a regular will, and introduce his

*daughter, as apparently he gladly would have done, by his own name, as his acknowledged daughter, he would have given her the 2,000*l.* and the 3,000*l.*, and then the 20,000*l.*? In his view she had changed her character; changing her character, she had changed her position; changing her position, he changed her fortune. He never meant that what he had given to her in the one position should be given to her in another position. In the one character he gave her a small sum, in the other a large sum: she must take the one character or the other, she cannot take both. This accounts for the words "Not having time to alter my will." I have got the report before me of what fell from me when I decided this case in Ireland, and I see I expressly put it on the very ground which has been adverted to by my noble and learned friend, namely, that it was an alteration of the will, and that if he had had time, he would have made a new will, and the new will would have contained what appears in this, which was to supply the place of what he could not at that moment feel sure he should have time to prepare, namely, a new will. I put it twice upon that express ground. The question then is, how is this reconcileable with the rule of law? I was very careful in what fell from me, as I always am, not to break in upon any rule of law. I considered myself at liberty, without trenching upon any rule of law, or breaking in upon any decision, to determine this case upon the intention. There is no rule of law that prevents a Court from looking to the intention. Every case that you open says, If you find the intention, you are at liberty to act upon it; and the simple question in this case is, Do you or do you not find the intention? Of that I have already spoken. Then there is no difficulty about the rule of law. There is no case exactly like this, nor is it likely that exactly such a case should frequently occur. You must depend upon the

[*311] principle. If you can find *within the four corners of the instrument an intention, not that the legacy shall be cumulative, but that it shall be substitutionary, you are at perfect liberty to act upon that intention; you are not only at perfect liberty, but you are bound by law to give effect to it, provided only that it does not contravene any existing rule of law.

There may possibly be persons who would not come to the same conclusion on the construction of this will, but hitherto all opinions have been unanimous on that point. The case has been frequently quoted since it was decided, and never with disapprobation.

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This case took a very singular turn. It was decided by me in Ireland in 1842. This young lady received the 20,000*l.* after the decision, and not only received that sum, but, as the father had adopted her and placed himself *in loco parentis*, I gave her interest, according to the rule of Court, on the 20,000*l.*, which I should not have been at liberty by the rule of Court to do, if I had adopted a different construction of the will. She took the principal and the interest, and then, seeming to find fault with the decision, and having a child born, she filed a new bill. That bill came before my learned successor, the present Lord Chancellor of Ireland; it was argued at great length by the first counsel at the Bar there, three on one side, and four on the other; thirty-six authorities were cited, and he came to the same conclusion which his predecessor had done, and, after a fortnight's time taken for further consideration, he adhered to the opinion he had at first expressed. The whole argument was addressed to the very decree against which there had been no appeal, and had reference only to the judgment, against which there is no appeal. It is well as it has happened, that the House has come to this decision, for otherwise we should have been in much embarrassment to know what to do with the case, because, if the decree of 1847 had been reversed, the decree of *1842 would still have stood, and would have bound the parties to that suit. Fortunately, it has happened that that embarrassment has not taken place, and I entirely agree in the opinion expressed by my noble and learned friend. Upon the first hearing, the lady had her costs out of the funds. On the second bill being filed, the present LORD CHANCELLOR OF IRELAND dismissed the bill, with costs; and I apprehend that this appeal should also be dismissed, with costs.

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EX PARTE WHITE, IN RE TOMMEY v. WHITE.

(4 H. L. C. 313—336.)

A judgment of this House given on an appeal cannot be reversed; but where such appeal and judgment have been obtained by suppression and misrepresentation, the House will afterwards discharge the order granting the leave to appeal and the order constituting the judgment thereon.

A decree in Chancery was made in January, 1835, and enrolled in May of that year. A petition for leave to appeal against it (the proper time for

1853.
Feb. 25.
March 3, 7.
April 5.

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appealing having gone by) was presented in February, 1839, and refused. The party who was dissatisfied with the decree filed a bill of review in 1844. A demurrer to that bill, for want of equity, was allowed. The order allowing the demurrer was appealed against in 1846, and in the appeal the original decree was expressly complained of. In July, 1847, there was a general dismissal of the appeal, and the order allowing the demurrer was specially mentioned in the order of dismissal; but the original decree was not mentioned. In 1848 there was a petition for leave to appeal against the original decree and certain other orders made in the course of the proceedings, but which had not then been enrolled, and in the petition it was stated that "it appeared by the order of July, 1847, that the decree of January, 1835, had not been complained of, and therefore that their Lordships had not made any declaration with respect to it," and that "the said decree had never been adjudicated upon by their Lordships." On this petition, and after other proceedings taken, leave was given to include in the appeal the decree of January, 1835. The appeal was heard *ex parte*, and in June, 1850, the decree was reversed:

Held, that this reversal had been obtained by suppression and misrepresentation, and the parties affected by it having petitioned for relief, the House discharged the order giving leave to appeal against the decree of January, 1835, and the order which had reversed that decree.

No costs were given.

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In May, 1832, Tommey took the lease of an hotel in Sackville Street, Dublin, for thirty years. In May, 1833, *he assigned this lease and his stock in trade to White, Courtenay, and Kernan, in trust for his creditors. Under certain circumstances the trustees were to have a power to sell, giving three months' notice. They claimed, on the 5th of April, 1834, to exercise this power; but as Tommey resisted, they, on the 9th of that month, filed a bill against him in the Court of Chancery, in Ireland, for a sale, the appointment of a receiver, and an injunction. On the 25th of April, 1834, the MASTER OF THE ROLLS made an order for a receiver and an injunction (this order was not enrolled till the 18th June, 1849), and on the 15th May, 1834, an order for a writ of assistance to put the receiver into possession. On the 30th of January, 1835, Lord Chancellor SUGDEN made a decree for the sale, reserving further directions. The sale took place accordingly. This decree was enrolled by the trustees on the 20th of May, 1835. On the 3rd of June, 1836, Lord Chancellor PLUNKET made a decretal order, founded on this decree. In 1837, Tommey filed a cross bill, in the nature of a bill of revivor and supplement, which was dismissed for want of prosecution. On the 19th of June, 1837, Tommey petitioned to have the property sold restored to him. On the following day Lord PLUNKET heard and dismissed this petition. In February, 1839, Tommey petitioned this House for leave to appeal against the decree of the 30th of January, 1835, the standing order 118

preventing him from bringing an appeal without special leave given, as more than three years had elapsed since its enrolment. Leave was refused. In March, 1839, Tommey petitioned the House that the order of the Appeal Committee might be rescinded, declaring that he desired to appeal against the decision of Lord PLUNKET, *made on the 20th of June, 1837, by which a return of the property sold had been refused. Leave was granted, and an appeal was accordingly presented against his Lordship's order. This appeal was heard *ex parte*, and was dismissed (1). In June, 1844, Tommey filed a bill against White, Courtenay, and Kernan, for review and reversal of the decree of 30th January, 1835, he having previously filed a supplemental bill, which was dismissed for irregularity and non-compliance with the general orders of the Irish Court of Chancery (2). The defendants demurred to this original bill of June, 1844, for want of equity, and on the 30th of January, 1845, the MASTER OF THE ROLLS made orders allowing the demurrer with costs. An appeal against this order was presented to Lord Chancellor SUGDEN, who, by an order of the 14th of February, 1845, affirmed that of the MASTER OF THE ROLLS. In February, 1846, Tommey presented to this House an appeal against these orders of 1845, and also against the decree of January, 1835, which appeal was heard *ex parte* the appellant, and was dismissed (3); but the order of dismissal, dated 8th July, 1847, did not expressly mention the decree of January, 1835, but dismissed the appeal and affirmed the orders of January and February, 1845. On the 3rd of April, 1848, Tommey presented a petition to the House to be allowed to appeal against the decree of January, 1835, the orders of April and May, 1834, and the decree of June, 1836, the last three not having been then enrolled. This petition set forth, "That your petitioner is advised to appeal from the said several decrees of the 30th January, 1835, and 3rd June, 1836, and from two orders of the MASTER OF THE ROLLS *in Ireland, dated respectively the 25th April, 1834, and 15th May, 1834, mentioned in the said first decree, and which said last-mentioned orders have not been enrolled. That by an order of this Right Hon. House, dated 5th February, 1846, it appears that an appeal was brought on your petitioner's behalf, 'complaining of a decree of the Court of Chancery in Ireland, of the 30th January, 1835 (which said decree was enrolled on or about the 17th day of April, 1835), also of two orders, on demurrer, of the MASTER OF THE

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(1) 6 Cl. & Fin. 786.

(3) 1 H. L. C. 160.

(2) 6 Ir. Eq. Rep. 303.

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ROLLS in Ireland, dated respectively the 30th January, 1845, and also of an order of the said Court of Chancery of the 14th of February, 1845;’ and praying your Lordships to reverse the said decree, and also to reverse the said several other orders appealed from. That by an order dated 8th July, 1847, your Lordships were pleased to order ‘That the said two orders on demurrer of the MASTER OF THE ROLLS in Ireland, dated respectively the 30th January, 1845, and the said order of the Court of Chancery in Ireland, of the 14th February, 1845, complained of in the said appeal, be, and the same were thereby affirmed;’ that it appears by the said order of the 8th of July, 1847, that the said first decree of the 30th of January, 1835, was not complained of in the appeal presented on your petitioner’s behalf on the 3rd of February, 1846, and therefore your Lordships have not been pleased to make any declaration, with respect to the decree mentioned, in the order of the 5th February, 1846, as having been appealed from. That the said several decrees and orders which form the subject of your petitioner’s new appeal have never been adjudicated upon by your Lordships.” The Appeal Committee, on the 23rd of May, 1848, gave leave to Tommey to appeal against the decree of 1836 and the orders of 1834, with liberty, when the appeal should be before the House, to make application to include therein the decree of 1835. In June, 1848, *Tommey presented his appeal, and made the application thus permitted, and in September, 1848, a report of the Appeal Committee, recommending that he should be allowed leave to amend his appeal by including the decree of January, 1835, was agreed to by the House. The appeal was amended accordingly, was heard *ex parte* on the 18th of June, 1850, and on the 2nd July, 1850, judgment was pronounced, reversing all that had previously been done (1).

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On the 22nd of July, Messrs. White, Courtenay, and Kernan, who had taken no part in the proceedings in this House, presented a petition for rehearing of the appeal; which petition was, on the 25th of July, refused to be entertained by the House. They afterwards presented a petition praying that they “might be heard in opposition to the amended petition and appeal of the 27th of June, 1848, and in support of the several decrees and orders therein complained of, notwithstanding the order of the 2nd of July, 1850, and that for that purpose there may be a rehearing of the said amended petition and appeal, &c. &c., and that your Lordships will

grant to your petitioners such further or other relief in the premises as to your Lordships, in your great wisdom, shall seem meet and the circumstances of this case shall require." 'Tommey presented a counter petition, praying the House, in substance, to dismiss their petition.

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The House, on the report of the Appeal Committee, granted the petitioners leave to be heard, by one counsel on a side, on the subject of this petition, for relief against the appeal of 1848, and the proceedings thereon.

Sir F. Kelly (with whom was *Mr. F. S. Reilly*), for the petitioners :

* * The petitioners pray that their petition may be entertained on two grounds ; first, that the House having entertained the appeal of 1846, which was against the decree of 1835, and having in 1847 dismissed that appeal, the judgment of this House, so pronounced in 1847, may be treated as final with respect to that decree, and that there is no jurisdiction in this House again to entertain the same appeal against the same decree ; secondly,—and this is the more important ground,—that the permission to include the decree of January, 1835, in the appeal of 1848, and consequently the inducement to this House to entertain that appeal, was procured by fraud, falsehood, and misrepresentation ; and all the proceedings taken under it are therefore void, and the parties thereby injuriously affected ought to be let in to defend themselves against such erroneous proceedings.

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Mr. Elmsley, for *Tommey* :

* * Before 1848 the House had really never decided on the decree of 1835, and then, after fully debating the question of allowing *Tommey* leave to appeal against that decree, the Appeal Committee granted him that leave.

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(THE LORD CHANCELLOR : It is the petition, then, presented by him which is charged to be a fraud on the House, for no lawyer can read it without believing that it asserts that the decree of January, 1835, was never complained of.

LORD TRURO : And therefore, as that decree was supposed *not to have been complained of, the Committee and the House thought that it had not been disposed of. The reverse was the fact.)

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* * The statement in the petition of April, 1848, that "it appears

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by the order of July, 1847, that the decree of January, 1835, was not complained of in the appeal of February, 1846," is not a misrepresentation; it is a true statement: the order of July, 1847, does not mention the decree of January, 1835; and the appellant did distinctly convey to the House the fact that he had brought that decree under the notice of the House, but that the House had not adjudicated upon it. The order of July, 1847, establishes the truth of that statement.

[324] *Mr. Reilly* (in the absence of *Sir F. Kelly*), in reply. * * *

April 5. THE LORD CHANCELLOR:

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This case comes before your Lordships upon a petition presented under very unusual circumstances, circumstances fortunately of rare occurrence, and which I will shortly state. (His Lordship did so. On coming to that part of the statement which related to the bill of review filed in 1844, he said:) Tommey was quite justified, if he thought fit, in taking any further steps which the law enabled him to take, and consequently, in the year 1844, he filed, in the Court of Chancery in Ireland, a new bill of review, calling in question the decree of the year 1835. In order to sustain a bill of review, the party filing such a bill must be able to do one of two things. Either he must show that there is error apparent on the face of the original decree, or he must show that though the decree appears on the face of it to be correct, yet, from matters subsequently coming to his knowledge, and which he had not the means of bringing before the Court upon the hearing of the original *cause, the decree is in fact wrong. In order to sustain a bill of review upon that latter ground, the party filing such bill is put to the necessity of filing with it an affidavit stating the truth of the matter so subsequently discovered. No such affidavit was filed here, and therefore the bill of review must be founded, if it could be supported at all, upon error apparent upon the face of the decree itself.

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Such a bill was filed on the 5th of June, 1844. To that bill the defendants, the trustees, demurred, on the ground that there was no error apparent upon the face of the decree. Those demurrers came on to be heard before the Master of the Rolls in Ireland, and afterwards by way of appeal before the Lord Chancellor, and in both cases the demurrers were allowed. Both those learned Judges were of opinion that there was no error at all apparent upon the face of the decree.

In that state of things, on the 5th of February, 1846, Tommey presented an appeal to this House against those decisions pronounced by the MASTER OF THE ROLLS and the LORD CHANCELLOR OF IRELAND, in the year 1845, whereby they allowed the demurrers, and in that same appeal he, certainly very erroneously, did that which, if this House had been aware of it, would probably not have been permitted; he included in it, also, a complaint, by way of appeal, against the original decree of 1835, as to which the House had already refused to allow him to appeal six or seven years before. However, in point of fact, he did appeal against the decree of 1835, and against the subsequent orders. That appeal against the decree of 1835, and the orders of 1845, came on to be heard before your Lordships in the month of July, 1847, and upon the hearing the appeal was dismissed, and the two orders on the demurrers affirmed. There is this distinction, undoubtedly, and *some little point was made respecting it, though I conceive it to be utterly unimportant, that the appeal was dismissed generally, and then that which perhaps was mere surplusage was added as to the orders upon the demurrers, not only that the appeal against them was dismissed, but that they were affirmed. As to the decree of 1835, nothing was said, except that the appeal was dismissed. I presume the reason of that was this, that the House must have considered that though Tommey had presented such an appeal, it was altogether irregular; the House had refused him leave to present such an appeal, and therefore, being an irregularity altogether, it was dismissed, no order at all was made upon it; but an order was made in respect of the orders upon the demurrers, which alone were regularly brought before the House on appeal. It is a mere conjecture whether that was the reason of the distinction, or whether it was a distinction which crept in *per incuriam*; what was the cause of it I do not know; but what is important is, that the appeal in which, contrary to the order of the House, or without the order of the House, the decree of 1835 had been included, was dismissed.

That took place on the 8th of July, 1847; but Tommey was not minded to acquiesce in it, and on the 3rd of April, 1848, he presented another petition to be allowed to appeal against the decree of 1835, and against the orders of 1834 (which were interlocutory orders before the decree appointing a receiver, and have become perfectly unimportant), and against the decree on further directions. Now with regard to all those proceedings, except the decree of 1835, there is no order of your Lordships' House that stood in the

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way of such an appeal ; for though a great many years had elapsed, yet the order of your Lordships' House, as it then existed, was only an order to prevent persons appealing except within a certain time after the decree or orders had *been enrolled, a mere formal proceeding; and inasmuch as nothing here had been enrolled except the original decree, there was no order of this House which stood in the way of an appeal against those subsequent proceedings. Consequently, what was done was this : Tommey presented his petition, stating in it as follows. (His Lordship read the petition (1) .) That is a complete misrepresentation. It was argued that all that is said is, that it appears by the order that the decree of 1835 was not complained of. Now that, I think, is fencing or quibbling in a way that your Lordships will never permit to any suitor at your Bar. If you come to scan the matter in the closest way, it is a misrepresentation. It is not correct to say, that it appears by the order that the decree of 1835 was not complained of ; perhaps, speaking by the card, it might not have been an untruth to say, that it does not appear by the order that it was complained of ; that is a statement which might, in mere strictness of language, have been warranted. But it is not in any sense true to say that it appears by the order that it was not complained of. All that can be said is, that the order is silent about it, if you can treat it as being silent when it dismisses in terms the appeal, which did in fact include that decree as a subject-matter of complaint. It appears to me, that it was a statement well calculated to mislead your Lordships. However, it was introduced into the petition of Tommey, and that petition was referred to the Appeal Committee to decide whether he should have leave to appeal against those several orders which had not been enrolled, and as to which he was not barred by the standing orders of the House, and also against the decree as to which he was barred, but which he thus alleged not to have been complained of or adjudicated upon. That

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*petition was successful, for on the 23rd of May, 1848, leave was given to him by the Appeal Committee to appeal against the orders which had not been enrolled, and leave was also given to him, when he should have lodged his appeal against the unenrolled orders, to apply for leave to amend it, by including in it the enrolled decree.

Accordingly, pursuant to that leave, on the 27th of June, Tommey did present to the House a third appeal, complaining, not of the enrolled decree, but of the unenrolled orders. Having done that,

(1) See *ante*, p. 127.

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and so obtained the *locus standi* for which the Appeal Committee had stipulated, as the condition on which he might apply for leave to extend his appeal, he did, on the 29th of June, 1848, present a petition to the House, praying to be allowed to do so, by including in it the enrolled decree of January, 1835. That petition was heard before the Appeal Committee, and the leave so to amend his appeal was granted. He accordingly extended the appeal so as to include that decree, and the cause then being in the shape of an appeal against the decree of 1835, as well as against other subsequent proceedings, came on to be heard in 1850, and being so heard, relief was given to Tommey by reversing everything which had before been done.

Mr. Tommey has had the misfortune of being a person in embarrassed, and indeed totally insolvent circumstances; so much so, that all these proceedings have been carried on by him *in formâ pauperis*. Though the permission so to carry them on is one which must be given for the furtherance of justice, it very often operates with cruel hardship upon the opposite parties, and so these gentlemen throughout these proceedings have found it; because I observe that, from the time of these proceedings in this House, when this House refused to allow the original decree to be touched, in *the year 1839, the parties who were opposed to Tommey, namely the trustees, have never appeared at all. They have taken it for granted that your Lordships would adhere to the resolution to which you then came, and they have always avoided the expense of appearing. One sees the reason of that. They could not appear here without incurring a very grievous expense, and they relied upon the fact that they had the decree of January, 1835, in their favour, and that that decree stood untouched. The property had been sold under it, and your Lordships had refused to allow any appeal to be heard against it, therefore they left Mr. Tommey to take what course he might be advised to take. It is not pretended that notice was ever served upon the trustees, the original plaintiffs, of the order of the 23rd of May, 1848, by which leave was granted to appeal to this House against the unenrolled decree, with liberty to apply afterwards to add the enrolled decree, or of the second order of the 2nd of September, whereby leave was given to include that decree. The consequence was, that this was done in the absence of those gentlemen, they relying upon the former order. It does not appear whether they knew what had been done in the year 1847, when the appeal against the decree of 1835 had been dismissed; but certainly they knew of the original

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order by which the House had refused to allow any appeal against the decree of 1835. The original plaintiffs, relying upon that, took no pains on the subject, and the first thing which they heard as to the result of what had taken place in the year 1850 was this, that all which had been done from the beginning, everything which had passed, had been, behind their backs, reversed. Mr. Tommey had come here, and *had conducted the case as he had his other cases, altogether *ex parte*. For that I do not think he was to blame. I do not mean that he did not attempt to serve all that it was legally necessary to serve with notice; but such was the result, that in truth, behind the backs of the parties really and deeply interested in the litigation, all that had been done in it was reversed. Under these circumstances, they presented the petition which is now under your Lordships' consideration, and which has been met by the counter-petition of Mr. Tommey.

Those two petitions being before your Lordships, the course taken by the House was to give the parties leave to be heard upon the matter of the petitions, by one counsel on a side. The hearing has now taken place, and has received the full attention of this House. At the time of the hearing, there were present my noble and learned friend Lord Brougham, now not here, and also during a large portion of the argument, my noble and learned friend Lord Truro, who is compelled, through indisposition, to be absent; but from both those noble and learned Lords I have the fullest authority to say, that they entirely concur in the course I am about to recommend to your Lordships. Lord BROUGHAM, without hesitation, because he heard the whole; and Lord TRURO, with as little hesitation as that with which any person can speak who has not heard everything that was said. He does not wish that anything I now say should pledge him absolutely; because it is possible that he might have altered his opinion had not he been prevented by ill health from hearing the last hour or two of the argument. With that exception, the case has been fully heard and considered, both by Lord BROUGHAM and himself.

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Now comes the important question,—what ought your Lordships to do in this state of things? It was pressed very *strongly on the part of Tommey by his counsel, that your Lordships in truth have no jurisdiction; that after a matter has once been heard and adjudicated upon in this ultimate court of appeal, there is an end of it, that there must be an end somewhere, and that if it can be said 'hat the trustees can be heard now to come and call in question the

decree of 1850, what is to prevent Mr. Tommey coming afterwards, in 1860, and praying your Lordships to reconsider it again, and so *toties quoties* to the very end of time? That is, undoubtedly, an argument entitled to the greatest weight; but, unfortunately for Mr. Tommey, it appears to me to be an argument wholly inapplicable to his case, and which cannot lie in the mouth of one whose case has been twice adjudicated on against him before it was adjudicated on in the last instance in his favour, behind the backs of the other parties. I say adjudicated on. I know his argument was, that the merits were not gone into. Whose fault was that? It was adjudicated on in 1839, when this House held, on general principles, that it was not fit that he should be heard any more; it was adjudicated upon, or, but for his own fault, might have been adjudicated upon, but I say clearly it was adjudicated on in 1847, when he brought an appeal before your Lordships; an appeal supported by a case containing seven reasons for reversal, of which four related to the original decree, and three to the other matters. He was heard, with all the arguments he thought fit to put forward, and on that occasion the House came to the determination that that appeal ought to be dismissed. Does any argument, therefore, as to the finality of the decree, lie in the mouth of Mr. Tommey? For the reasons I have stated, I think it does not. I think, at the same time, that that argument itself is one which ought to receive the very greatest attention. Several authorities were referred to, in which it had been stated by Lord ELDON and other learned *Judges, that a case once decided here between A. and B., is, as against A. and B., conclusively and for ever decided, and that nothing but an Act of Parliament can afterwards alter the decision. I think that is so: but then it appears to me that the matter was finally settled against Mr. Tommey either in 1839 or in 1847, and that brings me to observe upon the qualification which is introduced by Lord ELDON on this subject, which has a material bearing upon the present case. Although in any question decided by this House upon appeal the matter is finally settled between the litigant parties, it is always subject to this condition, that if one party has, by any misrepresentation, I will not put it so high as to say by fraud, for I do not wish to use harsh terms, but, if by misrepresentation, inadvertently (if you will) introduced, a party has led the House into an error, has led it to suppose that something is going on irregularly, all the commonest principles

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of justice compel this House, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting a fraud, or the machinery for effecting that which, if not done *per incuriam*, would have been a fraud.

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Now that appears to me the principle which must govern your Lordships in the present case. Here is a case in which I must say I think no blame is attributable to the trustees. It could not be expected that they were to come here, year after year, at great, and as they had good reason to believe, at needless expense, litigating with a person who was conducting his case *in formâ pauperis*. They supposed, upon the very principle which Mr. Tommey invokes, that your Lordships would adhere to your former decision, and they have not, therefore, stepped forward to defend it at your Bar. It has happened that, behind their backs, a decree has been made reversing that which they *had a perfect right to consider finally and for ever settled. Now, what is the course your Lordships ought to take? I think the precise relief which is asked by these gentlemen is quite erroneous. They ask that the case may be reheard. That is not what I recommend your Lordships to do at all. But though they ask that, they ask also in a general way, what is sufficient for a case of this sort, "that your Lordships would grant to the petitioners such relief as to your Lordships in your great wisdom shall seem meet." What is the relief, then, which your Lordships in your wisdom ought to think fit to grant to these parties? Evidently to put them in precisely the same position as that in which they were before that erroneous order was made (behind their backs), giving leave to Tommey to present the appeal which has led to all the difficulty. That is the relief which I shall propose to your Lordships to grant. It may be true or not, that the decree of 1835 was altogether wrong; I have not sufficiently investigated it to give anything like an opinion to your Lordships whether it was right or wrong. All I can say is, that it was the decree of an eminently learned and distinguished Lord CHANCELLOR, who has since then again held the office of Lord Chancellor of Ireland, and lately that of Lord Chancellor of England, and was in substance acted on by Lord PLUNKET. The presumption, therefore, may be said to be strongly in its favour. Still, we are all liable to err, and, for the purpose of the present argument, I will assume that that decree was wrong. But that will not shake me from the position I take up, which is, that, right or wrong, there must be an end of a litigation at some time

or other, and that that end had been arrived at here, if not, as I believe, in the year 1839, certainly in the year 1847, and that all that was done afterwards, as to bringing it again in question, was done in error and contrary to principle.

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What I propose, therefore, is that your Lordships shall discharge the order of the 23rd of May, 1848, being the order allowing this last appeal; that of the 2nd of September, 1848, being the order allowing the introduction of the enrolled decree, as a matter appealed against; and the order of the 2nd of July, 1850, which was the order made upon hearing the appeal. I shall move your Lordships to discharge those orders, and to direct that the Court of Chancery in Ireland should deal with the case remitted back to it by the order of 1850, in such a way as may be just, having regard to the fact that the several orders aforesaid have been discharged.

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Mr. Tommey: Do your Lordships make any order in regard to the costs of this application?

THE LORD CHANCELLOR:

There are no costs asked for on the other side.

Mr. Tommey: They undertook to pay the costs.

THE LORD CHANCELLOR:

The House will give no costs.

CARTER v. DIMMOCK.

(4 H. L. C. 337—352.)

1858.
May 6, 9.

Under the Bankruptcy Consolidation Act, 1849 (12 & 13 Vict. c. 106), an adjudication in bankruptcy might be annulled by a Commissioner upon the application of the bankrupt within the time limited by s. 104 (viz., twenty-one days after advertisement of the bankruptcy in the *London Gazette*). After that date the bankruptcy could only be annulled by appealing to the Court of Chancery.

[This case turned upon bankruptcy law procedure now obsolete, and is accordingly omitted. The case is explained in *Lyall v. Jardine* (1870) L. R. 3 P. C. 318, 39 L. J. P. C. 43, which arose under a section of the Hong Kong Bankruptcy Ordinance Act, in which the same procedure was still in force.—O. A. S.]

GIBSON *v.* SMALL (1).

(4 H. L. C. 353—424; S. C. 1 C. L. R. 363; 17 Jur. 1131; affg. 16 Q. B. 141.)

By the law of England, in a time-policy effected on a vessel then at sea, there is no implied condition that the ship should be seaworthy on the day when the policy is intended to attach.

Per LORD CAMPBELL: There is not, in a time-policy effected on a vessel then abroad, any implied condition whatever as to seaworthiness; not even as to the time when the vessel sailed on the voyage during which the policy attaches.

Quære? Whether there is any such implied condition in a time-policy effected on an outward-bound ship lying in a British port where the owner resides.

A policy of insurance was effected in London on the 27th of November, 1843, on a ship then abroad, "lost or not lost, in port and at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the 25th September, 1843, and ending on the 24th September, 1844, both days included." To a declaration for a total loss on the 14th October, 1843, by perils of the sea, the defendant pleaded that "the ship was not, at the time of the commencement of the risk in the policy of insurance mentioned, nor at the making of the said insurance, nor on the said 25th September, 1843, in the declaration mentioned, seaworthy, or in a fit and proper condition to go to sea; but, on the contrary thereof, was wholly unseaworthy." It appeared in evidence, that on the 24th of September, 1843, the ship was at sea, seriously damaged, and in that state it succeeded in making Madras in the course of the following day. The verdict found the plea to be proved in fact:

Held (affirming the judgment of the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Queen's Bench), that this plea did not afford a defence to the action, for that there was no implied condition that the ship should be seaworthy on the day when the policy was intended to attach (2).

In this case an action had been brought in the Court of Queen's Bench by *Small* and others *v.* *Gibson*, on a policy *of insurance effected on the 27th of November, 1843, by them, as agents for Antonio Hypolite Gigual, on the ship "the *Susan*, lost or not lost, in port or at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the said 25th day of September, 1843, and ending on the 24th day of September, in the year 1844, both days included." *Gibson* pleaded four pleas, of which the second alone is material: "That the said ship or vessel, in the said declaration mentioned, was not,

(1) Upheld, *Dudgeon v. Pembroke* (1877) 2 App. Cas. 284, 46 L. J. Ex. 409, 36 L. T. 382; distinguished, *Couch v. Steel* (1854) 3 El. & Bl. 402, 2 C. L. R. 940, 23 L. J. Q. B. 121; referred to, *Redhead v. Midland Rail. Co.* (1867) L. R. 2 Q. B. 412, 435, 36 L. J. Q. B. 181, 16 L. T. 485; *Stanton v. Richard-*

son (1872) L. R. 7 C. P. 421, 435; *Kopitoff v. Wilson* (1876) 1 Q. B. D. 377, 381, 45 L. J. Q. B. 436, 34 L. T. 677; *Steel v. State Line SS. Co.* (1877) 3 App. Cas. 72, 77, 37 L. T. 333.

(2) See now Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 39 (5).

1852.

Dec. 9, 10.

1853.

April 28.

June 3.

Lord ST.
LEONARDS.Lord
CAMPBELL.The following
judges
attended:POLLOCK,
C.B.

MARTIN, B.

PARKE, B.

PLATT, B.

ALDERSON, B.

MAULE, J.

TALFOURD, J.

WILLIAMS, J.

ERLE, J.

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at the time of the commencement of the said risk in the said policy of assurance mentioned, nor at the making of the said insurance, nor on the said 25th day of September, in the year of our Lord 1843, in the said declaration mentioned, seaworthy, or in a fit and proper condition safely to go to sea; but, on the contrary, was wholly unseaworthy;" verification. Replication *de injuriâ*, and issue thereon.

At the trial of the cause at the London sittings after Trinity Term, 1848, it appeared that, about the beginning of September, 1843, the ship sailed from Madras for the Mauritius, with 288 coolies on board; encountered very bad weather, and put into Trincomalee, which place the captain was ordered to quit or to go into quarantine, as the small-pox was reported to be on board his vessel. He preferred the former alternative, and determined to try to return to Madras, in order to get repaired. He encountered bad weather on the voyage, and the vessel became still more damaged, but he arrived at Madras on the 25th of September; so that on the day on which the risk was to attach, the vessel was at sea, seriously injured, and endeavouring to make a port to get repaired. The necessary repairs could not be effected at Madras, and the captain therefore tried to reach Coringa, but met other misfortunes of a similar sort to those before experienced, and was obliged *to put into Masulipatam. The coolies refused to stay on board any longer, the surveyors reported against the possibility of repairing the vessel, except at a very considerable expense, and finally it was sold, and the owners gave notice of abandonment.

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The jury returned a verdict for the defendant, finding "that the said ship or vessel in the said declaration mentioned was not, at the time of the commencement of the said risk in the said policy of insurance mentioned, nor at the making of the said insurance, nor on the said 25th day of September, 1843, in the declaration mentioned, seaworthy, or in a fit and proper condition safely to go to sea, but, on the contrary thereof, was at those times, and each of them respectively, wholly unseaworthy." A motion was afterwards made to enter judgment for the plaintiff, *non obstante veredicto*, but the rule was discharged and judgment given for the defendant (1). A writ of error was then brought in the Exchequer Chamber, when the judgment of the Court of Queen's Bench was reversed, and judgment was given for the plaintiff *non obstante veredicto* (2). The case was then brought by writ of error to this House.

(1) 16 Q. B. 128.

(2) 16 Q. B. 141.

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The Judges were summoned, and Lord Chief Baron Pollock, Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Maule, Mr. Justice Erle, Mr. Baron Platt, Mr. Justice Williams, Mr. Justice Talfourd, and Mr. Baron Martin attended.

The *Attorney-General* (Sir F. Thesiger) and Mr. J. P. Wilde, for the plaintiff in error :

[*356] The question here is whether, in a time-policy as in a voyage-policy, it is an implied condition that the vessel *insured is seaworthy at the commencement of the risk. There has not as yet been any express decision on the point; but the principles that must govern the case are clearly settled. Seaworthiness is a condition precedent to the validity of a policy: [Park on Insurance (1), Marshall on Insurance (2), Arnould on Insurance (3),] *Douglas v. Scougall* (4), *Annen v. Woodman* (5), *Wedderburn v. Bell* (6), *Christie v. Secretan* (7), *Lee v. Beach* (8), in the last of which cases the defect was latent; but Lord MANSFIELD held the underwriter to be discharged by the mere fact of unseaworthiness, however innocent the owner was of knowing *and concealing that fact. * * Lord [*357] ELLENBOROUGH says, *in *Haywood v. Rodgers* (9), “that if, on any [*358] account whatever, *the ship be not seaworthy at the commencement [*359] of the risk, the underwriter is discharged from, or rather never incurred, any responsibility in respect to it.” It is clear, therefore, that this requisite of seaworthiness, the bare absence of which nullifies the contract, must exist when that contract attaches, and consequently it must do so whether that contract is a voyage-policy or a time-policy. The Court of Exchequer Chamber was wrong in making a distinction between these two sorts of policies. * * The distinction thus raised is itself not warranted by principle or authority, either English or foreign, and, if admitted, might give rise to many frauds.

(LORD CAMPBELL: Time-policies are rare among continental nations.)

That is so. Then what are the English authorities? In *Hucks v. Thornton* (10), which was an action on a time-policy, where the policy

(1) Ch. xi. p. 322, 7th ed.

(2) Bk. i. ch. v., s. 1, p. 152, 3rd ed.

(3) 1 Arn. on Mar. Ins. 653, 670.

(4) 16 B. R. 69 (4 Dow, 269).

(5) 12 B. R. 663 (3 Taunt. 299).

(6) 10 B. R. 615 (1 Camp. 1).

(7) 8 T. R. 192, per Lord KENYON and Mr. Justice LAWRENCE.

(8) Park on Ins. ch. xi. 342.

(9) 7 B. R. 638, 644 (4 East, 590, 598).

(10) 17 B. R. 594 (Holt, N. P. 30).

had a retrospective effect, and went back to a date long antecedent to that at which it was effected, one of the questions left to the jury by Lord Chief Justice GIBBS was as to the seaworthiness of the vessel; so that that learned Judge must have considered seaworthiness to be a condition to the validity of the policy. In *Hollingworth v. Brodrick* (1), which was also an action on a time-policy, Mr. Justice PATTESON, speaking on this subject, *said (2): "I do not know of any distinction on account of the risk being for time." In *Dixon v. Sadler* (3), also an action on a time-policy, the loss was alleged to have arisen from the misconduct of the master; and Mr. Baron PARKER (4) speaks of the obligation of the assured as to seaworthiness, and says that "it is not more extensive than in the case of an ordinary policy." This itself admitted that it was as extensive; and when that case was taken into the Exchequer Chamber, Lord Chief Justice TINDAL said (5), "No stress was laid, in the course of the argument before us, upon any distinction to be taken between the implied warranty on the part of the assured as to the seaworthiness of the ship, in the case of a policy on a particular voyage, and of a time-policy; nor do we think any such distinction can be held to exist: at all events, no distinction by which the obligation on the part of the assured, in the case of a time-policy, can be held to be increased or extended." * * The American authorities are to the same effect: and Chancellor Kent, in his Commentaries (6), "Every condition precedent requires a strict performance to entitle a party to his right of action;" and then, speaking of seaworthiness as a condition, he says, "The general rule is that the vessel must be 'seaworthy' at the commencement of the risk," whatever that risk may be, in order to make the policy attach and charge the insurer. In the judgment of Chief Justice SHAW, in the *case of *Paddock v. The Franklin Insurance Company* (7), after noticing Lord MANSFIELD's observation in *March v. Pigot* (8) as to a time-policy, it is stated that "the general rule, that the ship must be seaworthy at the inception of the risk, in order to make the policy attach, and charge the underwriter with the risk, probably would be applied in this, as in all other cases, being a necessary incident to the contract." Valin declares (9) that the question

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(1) 7 Ad. & El. 40.

(2) 7 Ad. & El. 47.

(3) 52 R. R. 774 (5 M. & W. 405).

(4) 52 R. R. 783 (5 M. & W. 415).

(5) 52 R. R. 784 (8 M. & W. 895, 898).

(6) Pt. v. Lect. xlviii. p. 235, New

York ed. of 1828.

(7) 11 Pickering's Reports (Massachusetts), 227, 232.

(8) 5 Burr. 2804.

(9) Comm. sur l'Ord. de la Marine, liv. iii. tit. vi. art. 29.

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whether the loss is to be charged against the insurers or not, is to be determined by the other question whether, at the time of departure for the voyage, the ship was in a state to perform it; for if not, then the loss arose, not from the sea, but from the condition of the ship itself.

(LORD CAMPBELL: According to your construction of this plea, to what point of time does it refer the question of seaworthiness?)

To any point of time at which by intendment the verdict of the jury would render the vessel unseaworthy. After verdict, every intendment is to be made in favour of the pleading affirmed by the finding.

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* * It is plain that there *may be a warranty given as to a thing over which a man has no power. A warranty of a horse will be valid, so that if the animal should die in consequence of a disease existing, though not known, when the warranty was given, the vendor could recover upon such warranty. It is so with a ship on a voyage-policy: *Lee v. Beach* (1). The same principle applies to a time-policy: [*Parmeter v. Cousins* (2); *Oliver v. Cowley* (3)]. This warranty is indeed a condition which attaches in all cases, and if it affects a shipper of goods, a shipowner cannot be exempt from it. Suppose a vessel was not in existence at the time of the risk commencing, that would render the policy void, though the fact was unknown to the parties.

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* * In principle there cannot be any distinction between a vessel lost before the commencement of the risk, and a vessel being in a state which all authorities declare not to be the subject of insurance. * * The contract does not depend on the knowledge of either party, for both may be incapable of knowing the condition of the vessel; nor does it depend on the question whether the ship was in a port where it could be repaired, but it does depend on the fact of the seaworthiness of the ship. Seaworthiness is a condition precedent to a vessel being the subject of insurance; and unless that condition exists, no insurance is valid.

Sir F. Kelly and Mr. Serjt. Shee (Mr. Unthank was with them),
for the defendants in error :

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The real importance of this case is in the extent to which *the Courts will impose on parties to written contracts, conditions which are not inserted in those contracts. There is clearly nothing which can be described as an authority for imposing on the assured in a

(1) *Park on Ins.* ch. xi. p. 342.

(3) *Park on Ins.* ch. xi. p. 343.

(2) 11 R. R. 702 (2 Camp. 235).

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time-policy the condition that, at the moment at which that policy is to attach, wherever the ship may be, and whatever may be the circumstances in which the ship is placed, it must be seaworthy, or the policy will be void. There is an expression of Mr. Justice PATTERSON in *Hollingworth v. Brodrick* (1), which is supposed to declare that such is the rule; but if the words bear that meaning, it is clear that that was not the point argued in the case, and that the *dictum* was not required by the decision. *Sadler v. Dixon* (2) is certainly no authority for it; and when the expressions there of Lord Chief Justice TINDAL are examined, they have rather an opposite tendency, for the latter part of the sentence plainly qualifies the former part. These are the only two cases which can be called authorities in favour of the plaintiff in error. The good faith of the assured, his ignorance of the state of facts, has nothing to do with this question. That matter relates to a totally different head of insurance law.

It may be admitted, that in a voyage-policy it is an implied condition that the ship shall be in a fit state to undertake the voyage at the moment when that voyage commences; but the question here is, whether there exists such an implied condition in a time-policy. The nature of the contract shows that there is no such implied condition. Here is a written contract, containing many stipulations; but none relating to the seaworthiness of the vessel. There is no reason of usage or of necessity why that should be superadded. The implied condition that the ship shall be seaworthy at the commencement of the voyage, is no more than *that it shall be fit for what it undertakes; and that implied condition arises from a moral as well as a legal obligation, and is one which it is in the power of the assured to fulfil. Whether the vessel is in a port of the country where the policy is effected or in that of a distant country, it is in the owner's power, or in that of his agent, to see that, "at the time of sailing," it is in a condition to perform the voyage. He is, therefore, bound by the implied condition which arises out of his duty, and consequently he may lose the benefit of his policy even by the existence of a latent defect. If the port where the vessel is will not afford the means of repair, as in the case of the vessels at St. Michael's and Madeira, the general principle remains the same; but necessity creates an exception to its application.

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(1) 7 Ad. & El. 40, 47.

(2) 52 B. R. 774, 784 (5 M. & W. 405; 8 M. & W. 895).

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The foreign writers give no warrant for the proposition now contended for by the plaintiff in error. Valin, in his commentaries on the Ordinances of 1681, says (1) that the right to recover on the policy depends on the question “si au depart il était vraiment en état de faire le voyage ou non ;” which plainly limits the question of seaworthiness to the commencement of the voyage.

(LORD CAMPBELL: Do you contend that, with respect to a time-policy, there is no condition or implication whatever with regard to seaworthiness?)

It will not in the least degree affect this argument to admit that the vessel must be in a seaworthy condition when the voyage is begun ; it does not follow that it must be so if the date of such policy should attach when the ship is at sea.

(LORD CAMPBELL: There are more policies on goods than on ships. The shipper of goods has no power over the vessel. How do you reconcile his incapacity to recover *where the ship was not seaworthy at the commencement of the voyage, with the claim of the assured here?)

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In such a case, if the owner of the goods is defeated in his action against his underwriter on the ground that the ship was not seaworthy at the commencement of the voyage, he has his remedy over against the owner of the ship for the breach of that implied condition ; he is therefore protected against the consequences of the application of the rule in this case ; but the shipowner has no such protection. When the ship is and has been at sea for some time, it is impossible for the shipowner to know anything of its condition, and consequently he cannot be assumed to warrant it to be seaworthy. The insurer on goods, or on a time-policy on ship, may possibly be taken to warrant the seaworthiness of the vessel when it left the port, but certainly not afterwards. There is no implied condition even in a voyage-policy touching the condition of a vessel when out at sea: *March v. Pigot* (2), and yet it is sought here to introduce such a condition into a time-policy. There is no such thing as a warranty of seaworthiness except for a voyage. It is impossible to apply it to a time-policy, for that is made when no certain voyage is determined upon, and the master cannot know what voyage he may have to make.

(1) Vol. ii. p. 81, liv. 3, tit. 6, (2) 5 Burr. 2804.
art. 29.

Mr. Wilde [was heard] in reply. * * *

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The LORD CHANCELLOR proposed the following questions to the Judges :

1. Adverting to the record and proceedings in this case, is the policy subject to an implied condition or warranty that the ship was seaworthy ?

2. If yea, then did the condition of seaworthiness mean that the ship was seaworthy at the time it commenced the voyage, or at the making of the insurance, or when the liability of the underwriters commenced, that is, on the 25th of September, 1843 ?

3. Are there any, and if any, what qualifications in *regard to such seaworthiness in a case like this which would affect the rights of either party under the policy ? [*368]

4. And, lastly, whether the plea is a valid plea in law in answer to the action ?

Lord Chief Baron POLLOCK, on behalf of the Judges, requested time to answer these questions. The request was acceded to.

MR. JUSTICE ERLE :

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My answer to the first question of your Lordships is in the affirmative, that the policy was subject to a condition that the ship was seaworthy. It appears to me that this condition is involved in all contracts of marine insurance, it being necessarily the basis of the calculation on which the insurer relies in fixing the amount of the premium he is to receive. That amount depends on the degree of risk ; in other words, on the chance of the ship encountering the perils insured against with safety ; and unless it is given, that the ship is in some degree fit to meet those perils, the loss is certain.

As the word " ship," in common use, may denote either a mere frame, or a ship with its apparatus ready for sea ; so, in marine policies, it may be construed to express either *the mere structure of timber, or all that must be combined therewith to make it fit to perform service as a ship ; and its meaning in different policies may be made to vary according to the different nature of the services required of the ships insured thereby ; and the contract, so construed, contains the condition that the ship insured has the degree of fitness for the service it is engaged in, which is expressed by seaworthiness ; it being now settled that the term " seaworthy," [*384]

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when used in reference to marine insurance, does not describe absolutely any of the states which a ship may pass through, from the repairs of the hull in a dock till it has reached the end of its voyage, but expresses a relation between the state of the ship and the perils it has to meet in the situation it is in ; so that a ship, before setting out on a voyage, is seaworthy, if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage. I have not found a definition of the word, but I gather its meaning, as above explained, from the decisions turning upon it. According to this view, the condition is derived from the construction of the words of the instrument. But whether it is said to be derived from this source, or from implication of law, founded on the nature of the contract, I am of opinion that time-policies are subject to it as well as voyage-policies. If the question turns on the construction of the instrument, time-policies may be taken to be identical with voyage-policies in all the terms, except those relating to the measure of the duration of the insurance. This, in voyage-policies, is measured by the motion of the ship ; in time-policies, by the motion of the earth. Each contract is for an indemnity, and each for a limited time ; and there seems no reason for holding that an alteration in *the terms relating to the time should alter the effect of terms relating to the indemnity.

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The case may be supposed of a ship about to sail from London to China, and one part owner may insure by a voyage-policy and another by a time-policy, both policies being in all other respects the same ; and the ship may arrive at the end of the time insured, in which case the time covered by both would be the same. But if the ship should be lost within that time, and should have been unseaworthy at the commencement of its voyage, it seems unreasonable so to construe the two contracts that the same words under the same circumstances should produce opposite results, and throw the loss on the insurer in the time-policy and on the owner in the voyage-policy. And yet this seeming absurdity would be the law if voyage-policies are subject to the condition in question and time-policies are not.

Also, if a time-policy is construed to be without any condition of seaworthiness, the liability of the insurer may be increased beyond the terms of his contract ; for, in the case of a ship insured from the 25th of September, if on the 24th it was so damaged by a storm

that it sank on the 26th from a peril which would have been harmless but for the prior damage, here the loss originates from a peril not included in the insurance; but if the insurance applies to an unseaworthy ship, the insurer is made liable beyond his contract. If the question turns on an implication of law arising from the nature of the contract, all the reasons for making the implication in voyage-policies are of equal force for making it in time-policies. It is equally essential as the basis of the calculation on which the insurer fixes the amount of premium, and equally essential to prevent fraudulent owners from insuring a ship for the purpose of its being lost.

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All authorities justify this view. The only judicial determinations on the question are those now appealed from. The Judges in the Queen's Bench were unanimous for the affirmative answer to the present question, and the Judges in the Exchequer Chamber, in overruling that judgment, express their opinion to the same effect in the following passage: "We are far from saying that there is no warranty of seaworthiness at all in a time-policy. So to hold would be to let in the mischief which the law provides against in a voyage-policy; or that there is not the same warranty in the case of a time-policy as in a voyage-policy, according to the situation in which the ship may be at the time of the insurance." The other authorities are declarations indicating an opinion that time-policies are subject to a condition of seaworthiness; and I refer to what was said by Chief Justice GIBBS in *Hucks v. Thornton* (1), Chief Justice TINDAL in *Sadler v. Dixon* (2), and Justice PATTESON in *Hollingworth v. Brodrick* (3), and to the passages in Arnould (4), and Phillips (5), being the authorities cited at the Bar. They may not be decisive for the affirmative; but they are decisive to establish that no Court, or Judge, or author, hitherto has intimated an opinion that there is no condition of seaworthiness in time-policies.

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The reason assigned for now deciding that time-policies should be exempt from any condition of seaworthiness is, that there is a class of owners who wish to insure ships for a time, and who by reason of the absence of the ships have no means of knowing whether their ships are then seaworthy; and because this class of owners is without the requisite knowledge, therefore all persons choosing to insure for a time ought to be exempt from the

(1) 17 R. R. 594 (Holt, N. P. 30).

(4) Ss. 248, 249, p. 670.

(2) 52 R. R. 784 (8 M. & W. 895).

(5) Ins. vol. i. p. 328.

(3) 7 Ad. & El. 40.

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condition which *has been hitherto the basis of the contract of the insurer. This reason appears to be unsatisfactory on many grounds: First, considering the present facilities for communicating with all parts of the globe, the owners who wish to insure ships which have been long unheard of and are in an unknown place cannot be so numerous as to make it expedient to unsettle the principle of insurance for the purpose of gratifying such a wish; 2ndly, the owners so situated, if they choose to insure from the date of the last advice that the ship was seaworthy, have the same means of knowledge, and therefore ought to be subject to the same condition as the owner who insures the homeward voyage upon information received from his agents abroad; and if they choose to insure from a later day they ought to take the risk of the interval; and, 3rdly, owners wishing to insure by a time-policy, to begin from a time long after the last notice that the ship was seaworthy, may by an additional premium stipulate that the ship should be admitted to be seaworthy. These are the grounds I have to submit for answering in the affirmative to the first question.

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My answer to your Lordships' second question is, that the condition of seaworthiness applied to the 25th of September. The contract of insurance commences at that time, and the condition is contained in or implied from the contract for the purpose of enabling the insurer to calculate the risk of a seaworthy ship from that time to the end of the insurance; seaworthiness at any other time appears to me irrelevant. I am not aware of any qualification material to the rights of the parties, if seaworthiness has the meaning above attributed to it. It may not be superfluous to add that, according to that meaning, in case of an insurance beginning in the course of a voyage, a ship which was seaworthy at the commencement of it would still be seaworthy, notwithstanding any loss by the ordinary *accidents of a voyage, if the risk of reaching the port of destination in safety was not materially increased by reason of such loss. But if the ship was dangerously damaged before the commencement of the insurance, the condition would apply, and the policy would not attach.

I think the plea valid. If all time-policies are subject to a condition, it is conceded to be good; if no time-policies are so subject, it is conceded to be bad. But if the law as to time-policies is as was supposed in the judgment of the Court below, and seaworthiness is understood as there explained, it is clear that all time-policies are subject to some condition of seaworthiness. It

is there supposed, that in case of policies commencing when ships are on their voyage, the condition is, that they were seaworthy when they began the voyage (the insurer being so made responsible for all damage in the course of the voyage prior to the beginning of his insurance), provided the ship existed as a ship when it began. And if that is the true state of the law, it seems that it would have been less anomalous to hold either that the risk should be said to have a qualified extension in such case to the commencement of the voyage, or that such a ship, if seaworthy at the beginning, should be taken, with reference to that insurance, to be seaworthy till the end of her voyage, than to hold that such policies stand on a different basis from all other policies, and that there is no condition in such a policy that the ship should be seaworthy at the commencement of the contract to insure. If either "risk" or "seaworthy" could be so understood, the plea would be good after verdict, as the Judge must be taken to have so explained the law to the jury.

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[Mr. Justice WILLIAMS agreed with Mr. Justice ERLE that the policy was subject to an implied condition of seaworthiness, and that the plea was valid.]

MR. BARON PARKE :

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The first three questions proposed by your Lordships, as well as the last, were under the consideration of my brethren and myself, by whom the present case was decided in the Court of Exchequer Chamber ; but as they were not necessary for the decision of the case in the Court below, we disclaimed deciding upon them, nor were they argued there so fully, nor so much deliberated upon, as if they had been essentially necessary to the decision of the case itself.

As your Lordships have now proposed to us the first three questions in distinct terms, it is my duty to pronounce my opinion upon them, which I proceed to do, though not with quite so much confidence or satisfaction to myself as I should have done, if they had been argued at the Bar in the manner they would have been, if essentially necessary to the decision of the question in the cause. That question was simply whether the fourth plea is valid ; and the only point involved in that question is, whether there is an implied condition in every policy of assurance for time, in the form of this policy, under all circumstances in which the ship shall be situated, that it should be seaworthy at the commencement

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of the term or the date of the policy. Unless there is, the plea is bad. I am of opinion that there is no warranty or implied condition that the ship was seaworthy at the commencement of the term; and, upon the best consideration I can give to the subject, I think I ought to advise your Lordships that there is none that the ship was seaworthy at any particular time; that there is, in fact, no warrant of seaworthiness at all.

The whole of the law upon this subject depends upon one question, whether there is any sufficiently distinct and clear authority in the common law, for annexing any condition of this sort to a policy of assurance for time.

The policy is a written instrument, which contains a number of express stipulations, but none on the subject of seaworthiness; for the notion that it was involved in the term "good ship" in policies is, I think, put an end to, for the reason stated in the judgment in the Court of Exchequer Chamber in this case, and has been entirely abandoned in the argument at your Lordships' Bar.

If, then, there is any such warranty or condition, it must be added to the written policy, as an incident annexed to the contract; and that, either by the usage of trade or by *the common law of the land; from the nature of the policy itself, there is no other way in which it can be added.

The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable.

This is explained in the case of *Hutton v. Warren* (1). But in this case there is no evidence stated on the record of such usage; and none such can be supposed to exist, unless there is evidence of it.

Such a condition may, however, be annexed as a necessary incident by the common law. The simple question is, does the common law annex any such incident? An examination of the authorities, judicial decisions, and *dicta*, and of text-writers on the common law, from which we derive our knowledge of that law, leaves us without any satisfactory proof that the same implied warranty or condition as to seaworthiness at the commencement of the risk, which confessedly is annexed to voyage-policies, or any warranty or condition as to seaworthiness, is annexed to time-policies.

In the common law of England, to be collected from these sources, there is ample authority that a warranty or condition of seaworthiness at the commencement of the risk is implied in all voyage-policies, whether it has been adopted originally from the law merchant, or implied from the very nature of the contract itself. So other conditions are implied; as, not to deviate from the usual course of the voyage,—to commence it in a reasonable time,—to disclose all material circumstances; and the non-performance of *these conditions avoids the policy, whether it arises from fraudulent motives or not. This is explained at length in the accurate report of the judgment of the Court of Exchequer Chamber in the Queen's Bench reports (1), (for as elsewhere reported it is full of errors), and the authorities there referred to, and they need not now be repeated.

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It is undoubted law that there is an implied warranty, with respect to a policy for a voyage, that the ship should be seaworthy at the commencement of the voyage, or in port when preparing for it; or had been seaworthy for the voyage when the voyage insured had been commenced, if the insurance is on a vessel already at sea; which voyage being commensurate with the risk insured, the warranty is compendiously described as a warranty of seaworthiness at the commencement of the risk; and this had led to the supposition that there is always such a warranty. It is also perfectly clear that, in our law, there is no other warranty of seaworthiness in a voyage-policy, than that the ship is seaworthy at the commencement of the voyage. There is no warranty in the law of England that the vessel shall continue seaworthy after the voyage has commenced; none that the crew, if originally competent, shall continue so; none that the vessel shall be navigated with due care and skill during the voyage; none that pilots shall be taken on board at proper places, if the voyage has already commenced, unless, perhaps, where required by Act of Parliament; none, on an insurance for one voyage out and home, that the ship shall be seaworthy on the return voyage; although these might all be very reasonable conditions to be imposed on the assured for the benefit of the underwriters, and which have been by law or custom imposed *upon American underwriters: for in all these respects our law differs from the law of the United States, in which it is the acknowledged rule, that the assured must not only have his vessel seaworthy at the commencement of his voyage, but keep it so, so

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far as depends upon himself, during its continuance; and the underwriters are discharged from any loss which is distinctly shown to have arisen from the negligence or misconduct of the assured, in not keeping the ship in a perfect state. The authorities are cited by Mr. Arnould, in his excellent book on Insurance (1).

The only warranty, then, as to seaworthiness in a voyage-policy, recognised by our law, is, according to all the authorities, that the vessel was seaworthy at the commencement of the voyage. But it is equally clear that there is no satisfactory decision, *dictum* of a Judge, or authority of a text-writer, that there is any such warranty of seaworthiness at the commencement of the term in a time-policy.

The Court of Queen's Bench proceeded, in their judgment in this case, on two suppositions: first, that the opinion of all the lawyers in modern times was clear, that there was no difference between a time-policy and one for a particular voyage, as to the implied warranty of seaworthiness; and that the same point was settled by the case of *Sadler v. Dixon* (2), following that of *Hollingworth v. Brodrick* (3). The judgment of the Court of Exchequer Chamber states the grounds for holding that the Court of Queen's Bench was mistaken in both these respects.

As to the first, the Judges then present were not, nor am I now, aware of any such prevailing opinion in the profession; and as to the opinion of text-writers, the authorities cited in the judgment show that this question was a matter yet unsettled. Mr. Arnould, [*400] after stating (4) that a question *has been raised whether the extent and meaning of the implied warranty is the same in a time as a voyage policy, states that the better opinion is, that it is, but that the question will afterwards be fully discussed by him; and subsequently (5) discusses it, and intimates his notion as to time-policies, that the implied warranty is, that the ship should be seaworthy when it sails under the policy for the voyage or course of navigation on which it is contemplated to be employed during the term; and what that voyage is, is a matter of evidence. This is not the same proposition as that the vessel must be seaworthy at the moment that the term commences, wherever it may then be, but quite a different one. He refers for that position to the case of *Alexander v. Pratt*, which came on in the Court of Exchequer 24th January,

(1) I. s. 247, p. 666.

(2) 52 R. R. 784 (8 M. & W. 895).

(3) 7 Ad. & El. 40.

(4) I. s. 154, p. 411.

(5) I. s. 248, p. 670.

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1846, where a vessel was insured for twelve months from the date of its arrival at Sydney; in which the question was discussed whether, when the vessel sailed on the intended voyage from Sydney, it was not required to be seaworthy for that voyage. He says the Court intimated its opinion that the vessel should be seaworthy for the voyage then intended; but the pleadings did not raise the question, and the cause was sent down to a new trial, with power to amend them, in order to raise it; and the cause was settled. This case in effect decided nothing; and it was so little the subject of argument at the Bar, that I have no note of it, though I have of all cases of the least importance at that period.

Mr. Serjeant Marshall (1), not having his attention directed to the distinction between time and other policies, lays it down that the ship insured must be seaworthy at the time of sailing, not at the commencement of the risk; and the late Mr. Justice Park, in his work on Insurance (2), *states the time of insurance to be the period at which the vessel was to be seaworthy,—certainly an inaccurate proposition, and probably not intended to be so understood, as one of the authorities cited by him refers to the commencement of the voyage, and the other is a mere illustration of Lord MANSFIELD's, in *Carter v. Boehm* (3), where the interest in a fort was insured for time, and his Lordship said that the utmost that could be contended for was, that the underwriter trusted to the fort being in the condition in which it ought to be, in like manner as it is taken for granted that a ship insured is seaworthy; but at what time the fort ought to be in that state was quite immaterial upon the facts, as in the opinion of the Court it was so at the time of the commencement of the term insured, and at the time of making the policy the fort was certainly lost. So that Lord MANSFIELD never could have meant to say that seaworthiness was necessary at the time of the loss.

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Mr. Phillips, an American author of repute, in his *Treatise on Assurance* (4), does not appear to think this a settled point in America. He refers to the opinion of the American Chief Justice SHAW, who says that, whether the rule of seaworthiness would apply when the ship had been on a long voyage, was a matter of doubt, and, if it did, it must be understood with great latitude, and he cites *Paddock v. Franklin Insurance Company* (5).

So far, therefore, as relates to the opinion of the text-writers, the

(1) *Ins.* vol. i. p. 151.(2) *P.* 450.

(3) 3 Burr. 1915.

(4) Vol. i. p. 328.

(5) 11 Pickering's Rep. 227.

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proposition in the judgment of the Court of Queen's Bench is by no means made out; nor is the judgment supported by any one of the authorities referred to as deciding the question.

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In the first case, *Hollingworth v. Brodrick* (1), the plea was, that after the term commenced, and before the *loss, the vessel became unseaworthy, and might have been repaired at a reasonable expense, and that the ship remained unseaworthy at the time of the loss; and the Court decided that plea to be insufficient, being of opinion that a state of unseaworthiness during the voyage could not be a defence, unless, at all events, it was shown to be the cause of the loss, if indeed that would make any difference (as it would not).

Nothing was decided as to there being any implied warranty in time-policies, as a condition precedent to the policy attaching, or as to the time to which that warranty relates. The only part of the case bearing upon the present question is the *dictum* of Mr. Justice PATTESON in the course of his judgment. But the learned Judge was evidently speaking with reference to that case, in which the question was, whether there was any implied condition as to keeping the vessel in repair after the term commenced; and, if it meant more than that there was no difference between a time-policy and a voyage-policy in that respect, and that there was a warranty or implied condition of seaworthiness at the commencement of the term, it is of less weight, because that question was quite foreign to that case, and did not arise at all in it. Nor did the case of *Sadler v. Dixon* (2) settle that point; on the contrary, the judgment of the Court of Exchequer expressly states the point to be unsettled; and it decided merely that the implied warranty was at least not more extensive than that on a policy on a voyage; and that if there was no contract for the conduct of the crew in one case, there was none in the other. When this judgment of the Court of Exchequer was affirmed, Lord Chief Justice TINDAL used some expressions which were contended before us to amount to an *opinion, that the implied warranty of seaworthiness was the same in a time and a voyage-policy, and applied to the commencement of the risk. But it is clear from the context that no such position was meant to be positively laid down; but only that the obligation of the assured on a time-policy was, after the policy attached, not more extensive than that on a voyage-policy, and did not require the assured to keep the vessel in a seaworthy state. The period to

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(1) 7 Ad. & EL. 40.

(2) 52 R. R. 774, 781 (5 M. & W. 205; 8 M. & W. 895).

which the warranty of seaworthiness attached was wholly immaterial in that case.

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The only other case cited before your Lordships was that of *Hucks v. Thornton* (1). That was a decision of Lord Chief Justice GIBBS at Nisi Prius, in a trial on a time-policy on a whaling voyage, with liberty of cruising for prize; and he held that it was enough to satisfy the implied warranty of seaworthiness if, at the commencement of the time, the ship had a crew fit for one of the purposes, though unfit for the other.

It may be inferred, from the fact of Chief Justice GIBBS leaving that case to the jury, that he thought that there was in a time-policy an implied warranty or condition of seaworthiness, of some sort, at the commencement of the term for which the ship was insured. But the facts may not have made it necessary for him to give that question much consideration, as the plaintiff was likely to succeed even if there was such a warranty; and at all events it was no more than a Nisi Prius opinion; and as the decision was in favour of the plaintiff, and the propriety of it could not be questioned by a motion for a new trial, it is of much less weight.

In this state of the *dicta* and decisions on the subject of warranties of seaworthiness on time-policies (and these are *all), it is impossible to say that they supply satisfactory proof that there is any warranty of seaworthiness at the time of the commencement of the term. The decisions distinctly show that there is none that the ship is to continue seaworthy for the term. In truth there is only one Nisi Prius decision in support of the proposition that there is such a warranty as to the commencement of the term. From the course the cause took, it could not be afterwards questioned; and the *dicta* referred to are explained by the context, or are extra-judicial. It lies upon those who seek to add another condition to a written contract, not expressed, where there is no evidence of usage of trade, to show that the law implied it. These authorities are of themselves, in my judgment, quite inadequate for such a purpose.

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If, however, precisely the same principle applied to both the case of a voyage and a time policy, if they were exactly analogous in this respect, less positive authority might be required; and it might be thought that these, at best slender authorities, would be sufficient. Perhaps even without them such a condition might be implied, if the cases were similar; but they certainly are not. In a voyage-policy, the owner of a ship has, generally speaking, the

(1) 17 R. B. 594 (Holt, N. P. 30).

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power to make the ship seaworthy at the commencement of the voyage. In the ordinary course of navigation he always does so for his own sake ; he is bound to do so for the safety of his crew, and for the safety of the cargo placed on board ; he contracts with every shipper of goods that he will do so. The shipper of goods has a right to expect a seaworthy ship, and may sue the shipowner if it is not. Hence, the usual course being that the assured can and may secure the seaworthiness of the ship,—either directly, if he is the owner, or indirectly, if he is the shipper, it is by no means unreasonable to imply such a contract in a policy on a ship on a voyage, and so the law most clearly has implied it.

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It may happen indeed, in some cases, from the want of proper materials, of skilful artizans, of proper docks in the port of outfit, of sufficient funds or credit, or from the hidden nature of defects, that the owner may not be able to fulfil the duty of making the ship seaworthy at the commencement of the voyage ; but the law cannot regard these exceptional cases, "*ad ea quæ frequentius accidunt jura adaptantur* ;" and it wisely, therefore, lays down a general rule, which is a most reasonable one in the vast majority of voyage-policies, that the assured impliedly contracts to do that which he ought to do on and before the commencement of the voyage ; that is, to make the ship seaworthy at the commencement of it, and in part, *quoad hoc*, in the preparation for it. The contract contained in the policy imposes on him no duties which were not incumbent on him before. But how different is in general the case of one who insures for a time ! He does not necessarily know the position of his vessel at the commencement of the term ; if the term commences whilst the vessel is absent from a port, he cannot, generally speaking, cause it thus to be repaired ; and no care or expense of himself or agent could secure that object. The ship may have lost anchor, or sails, or rudder ; part of the crew may have deserted, or be dead of malignant fever. All these deficiencies, generally speaking, are such that no care or expense could have prevented or cured. How unreasonable, then, would it be for the law to hold that there was in every case added to a policy, which is silent on the subject, a condition which, in most cases, it would be impossible for the assured to fulfil !

These considerations render a time-policy essentially different from one on a ship. They are powerful arguments against implying a condition of seaworthiness by a party who generally has it not in his power to fulfil it ; nor is it satisfactory to say that

the condition ought to be implied in *all cases where it acutally is in the power of the party to fulfil it, for the law usually acts by general rules, and the maxim which I have quoted is clearly applicable.

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Nor is it an answer to say that a more liberal construction of the term "seaworthy" in time-policies might obviate this objection, and that a different degree of seaworthiness is sufficient for the completion of a voyage already begun, than would be necessary for the entire voyage; that a ship which was in the commencement of the voyage perfectly seaworthy in respect of the state of hull, equipment, and stores, would be still seaworthy for this purpose, though in the middle of the voyage, when the time-policy should attach, the hull had suffered by wear and tear, the stores had been diminished, or the equipment deteriorated; for it still might be reasonably capable of performing the rest of the voyage. Doubtless this is true; but any laxity of the term "seaworthy" would not provide for the cases of losses of the anchors, rudder, or masts, or sails, or crew, or of irreparable sea damage, after incurring which no vessel could, in the most loose interpretation of the term, be considered as seaworthy.

I therefore come to the conclusion, from these premises, that there is not, in the case of a time-policy, an implied warranty or condition that the vessel must be seaworthy at the commencement of the term insured. I feel no doubt that this condition cannot be implied. I am equally clear that there is no implied warranty or condition that the ship insured shall be seaworthy at the date of insurance. There is a total absence of authority for this, if I except the part I have already quoted from Mr. Justice Park's book, and which is, for the reason above given, evidently an unintentional inaccuracy of expression. And, indeed, the expression in this policy, "lost or not lost," which means lost or not lost when the policy was effected, totally excludes all *idea of an implied warranty or condition that the ship was then seaworthy.

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Two other cases of implied warranty or condition of seaworthiness may be suggested in which there is more doubt. One, that the ship was seaworthy at the commencement of the voyage, of which the time insured by the time-policy was part; as, for instance, if the ship sailed on the 1st June, 1850, on a voyage from Liverpool to the East Indies and China and back, a voyage which might probably last two years, and the time-policy, being meant to cover part of that voyage, was from the 1st of June, 1850, to the

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1st of June, 1851, would there be any implied warranty or condition that the ship was seaworthy when it sailed from Liverpool? Would there be any if the time-policy expressly stated on the face of it, that the time was part of that voyage, as, for instance, that the ship was insured from the 1st June, 1850, to the 1st June, 1851, on a voyage from Liverpool to the East Indies and China and back? Upon this question I cannot answer your Lordships with so much confidence as upon the other. My opinion might possibly be qualified, or altered, by a more solemn argument, where those were the questions upon which the decision was to turn; but I now answer them by saying, that it seems to me that there is no warranty in either case, for this short reason, because I cannot find any satisfactory authority in the law of England for annexing such an implied condition or warranty to a written insurance, which *prima facie*, contains all the terms upon which the parties contract, though there is much more reason for implying such a contract than one of seaworthiness at the commencement of the term, inasmuch as it was competent, generally speaking, for the assured to secure the performance of such a condition, a condition of seaworthiness at the commencement of the voyage, and in the ordinary course of navigation he would do so.

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The absence of these implied warranties will not practically be attended with the mischief which it is said they are calculated to prevent. In cases in which the assured wilfully permits the ship to sail, or knows that it has sailed, on the voyage of which the time-policy covers part, in an unseaworthy state, the insurance would be void on the ground of the concealment of a material circumstance, and this will prevent the frequency of such an occurrence; and in all cases in which the underwriter wishes to be secure against such a contingency, he may take care to provide for it in the policy by introducing a warranty of seaworthiness at the commencement of the risk or voyage, which, however, would lead to a diminution of the premium.

The answers to the first three questions will lead your Lordships to conclude that my answer to the last question is, that the plea is clearly bad. The meaning of the term "commencement of the risk," used in the plea, is clearly the commencement of the risk which the underwriters are to take on themselves, the commencement of their liability; that is, the commencement of the term of insurance. If there was no implied contract or condition of seaworthiness at the commencement of the risk or term (which is the same

thing), there was none of seaworthiness on the 25th of September, and certainly none of seaworthiness at the date of the policy; for the policy is "lost or not lost." Therefore it is utterly immaterial whether the ship was seaworthy or unseaworthy at any of these periods, and the plea is clearly bad.

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[Mr. Baron MARTIN, Mr. Justice TALFOURD, Mr. Justice MAULE, and Lord Chief Baron POLLOCK expressed opinions to the same effect as Mr. Baron PARKE, that there was no implied condition or warranty of seaworthiness, and that the plea was bad. Mr. Baron PLATT and Mr. Baron ALDERSON agreed that the plea was no answer.]

LORD ST. LEONARDS (having stated the nature of the case, and the difference of opinion upon it among the Judges in the Courts below and in this House) said :

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The opinion of the majority of the Judges is that which I entertained at the close of the argument, and it has not been shaken by the arguments of the two learned Judges who supported the judgment of the Court of Queen's Bench. In a voyage-policy, where the contract shows the nature of the adventure, from which the intent of the parties may be collected, the law implies a consideration of seaworthiness to perform the voyage. This has long been a settled rule ; *but no such rule has ever prevailed in regard to time-policies. There being no such rule, I think your Lordships cannot imply a condition in this case, where there is nothing on the face of the contract to warrant it.

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Assuming the ship to be on a voyage when the time insured in a time-policy begins, all analogy fails between the case of a voyage-policy and a time-policy ; and the very argument in this case proves that seaworthiness is not an implied condition in a time-policy, warranted by custom and allowed by law. In such a policy neither party can be supposed to know the state of the ship when the risk commenced, and therefore it will be unreasonable to imply a condition of seaworthiness at that period. In the case of a policy for a voyage the condition implied is, that the vessel is seaworthy at the commencement of the voyage, not that it shall continue so. If, therefore, a time-policy effected upon a ship, then on a voyage, should be held to be subject to an implied condition in analogy to the other case, it would seem to follow that the underwriter who undertook to indemnify the assured for the period named must take the risk of the state in which the ship is from the beginning of that

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period, if the ship should be then at sea. A voyage-policy would cover the voyage, and any unseaworthiness during the voyage could not affect the policy. A time-policy effected during the voyage, for a period beginning while the ship is on the voyage, should, I think, at all events, be held to cast the risk on the underwriter just as he must have borne it at the period in question under a voyage-policy. The analogy could not be carried further even if the time-contract declared that the ship was then on a particular voyage.

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If the assured was guilty of any fraud or concealment that would of itself avoid the policy, and therefore the condition *contended for in time-policies is not necessary to guard against fraud or concealment.

If the ship had been lost after the commencement of the risk, viz. the 25th of September, 1843, though that was before the date of the contract, the underwriter would have been liable by the terms of his contract. It is clear, therefore, that no condition of seaworthiness at the date of the contract can be implied. Such a condition, therefore, if to be implied, could, in this case, only be implied at the commencement of the voyage; but there was no allegation as to any unseaworthiness at the commencement of this particular voyage, and courts of justice must act upon a rule general in its application.

If, however, a ship was about to sail upon a particular voyage, and a time-policy was effected, instead of a policy on the intended voyage, as at present advised, I think that a condition could be implied that the ship was seaworthy at the commencement of the voyage. But that is not this case. Any supposed difficulty on the part of underwriters may readily be obviated by the insertion in time-policies of an express warranty of seaworthiness at the commencement of the risk. I do not trouble your Lordships with the state of the pleadings, because it is admitted that the contention of the plaintiff in error cannot be maintained unless there is an implied condition in every policy for time, like that in this case, wherever the ship may be, that it was seaworthy at the commencement of the risk or the date of the policy. No such condition can, I think, be implied; and therefore I advise your Lordships to affirm the judgment of the Court of Exchequer Chamber.

LORD CAMPBELL:

My Lords, I entirely agree in the opinion of my noble and

learned friend who presided on the woolsack when this *case was argued at your Lordships' Bar, that the defendant in error is entitled to our judgment. The allegations in the plea of want of seaworthiness, although proved to the satisfaction of the jury, do not appear to me to constitute a defence to the action. I do not proceed upon the literal meaning of the word "seaworthy" which was contended for. Without regard to its literal or primary meaning, I assume it to be now used and understood to state that the ship is in a condition, in all respects, to render it reasonably safe where it happens to be at any particular time referred to, whether in a dock, in a harbour, in a river, or traversing the ocean.

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The question raised by this record is, whether upon a policy of insurance on a ship for time, in the form of that set out in this declaration, there is an implied condition that when the policy ought to attach and the risk to commence the ship shall be seaworthy, that is to say, in a proper state of repair and equipment with reference to the situation in which it may then happen to be? It is incumbent on the underwriter, who here denies his liability, to show that in every time-policy there is such a condition; for neither the declaration nor the plea discloses any facts from which the condition is to be implied in this case, if it is not to be implied universally.

There is no custom or usage of trade respecting time-policies, which we can take notice of, which affirms the existence of such an implied condition; and after an examination of all the authorities which have been cited on the subject, I think it quite clear that there is none to guide us to declare that such an implied condition does exist. The two decisions mainly relied upon, of *Sadler v. Dixon* (1), and *Hollingworth v. Brodrick* (2), have no application to the *question of seaworthiness under a time-policy at the commencement of the risk; and some casual expressions which may have dropped in those cases from learned Judges when this question was not at all under their consideration, are entitled to no weight. Nor do the American or continental jurists, on the present occasion, afford us any aid.

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The underwriter is therefore driven to contend, that because in policies on ship "from," or "at and from" a specified port to another specified port, or back to the port of outfit (commonly

(1) 52 R. R. 774, 784 (5 M. & W. 405, 8 M. & W. 895). (2) 7 Ad. & El. 40.

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called "voyage-policies"), there certainly is such an implied condition, the same condition is to be implied in policies from a particular day to a particular day (commonly called "time-policies"), without reference to the local situation of the ship when the risk commences or terminates.

With regard to voyage-policies, we have usage and authority establishing the implied condition as certainly as any point of insurance-law. These being wanting as to the extension of the doctrine to time-policies, the reasoning must be, that as far as this condition is concerned, the contract by time-policies rests on the same principles, and that no distinction can be made between them. The condition may have been implied in voyage-policies from considering that probably both the contracting parties contemplated the state of the ship when the risk is to begin, that this state must be supposed to be known to the shipowner, that he has it in his power to put the ship into good repair before the voyage begins; that to prevent fraud, and to guard the safety of the crew and the cargo, this obligation ought to be cast upon him before he can be entitled to any indemnity in case of loss; and above all, that this implied condition in voyage-policies is essentially conducive to the object of marine insurance, by enabling the shipowner, on payment of an adequate premium, and acting with honesty and securing *reasonable diligence, to be sure of full indemnity in case the ship should be lost or damaged during the voyage insured; but time-policies are usually effected when the ship is at a distance, the risk being very likely to commence when it is actually at sea. Under those circumstances, is it at all likely that either party would contract with reference to the actual state of the ship at that time with respect to repairs and equipments? The shipowner probably knows as little upon this subject as the underwriter. Any information which he has received tending to show that the ship is in extraordinary peril he is bound to disclose, or the insurance effected by him is void; but is it reasonable to suppose that he enters into a warranty or submits to a condition which may avoid the policy with respect to a state of facts of which he can know nothing? We must further consider that this condition, in many cases, he may have no power to perform. Above all, if this condition was implied in time-policies, their object might often be defeated, and the shipowner, acting with all diligence, and with the most perfect good faith, might altogether lose the indemnity for which he had bargained.

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Take as an example this policy, which is on the ship *Susan*, from the 25th of September, 1843, to the 24th of September, 1844.

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This vessel may have been employed on the South Sea fishery. It may have sailed from an island in the beginning of September, 1843, in all respects in a seaworthy state; but before the 25th day of that month may have encountered a gale of wind in which the sails may have been carried away, and other damage may have been sustained, and the master may have died of a malignant fever; but the ship touches at another island on the 26th of September, is completely re-equipped, takes on board a new master of competent skill, and prosecutes the adventure. *Afterwards, and before the 24th of September, 1844, the ship may be crushed between two icebergs. For anything that appears on the record, such may have been the history of the *Susan*; and these facts are consistent with all the allegations in the declaration and in the plea. On this hypothesis the owner could not be indemnified, because the ship was not seaworthy when the risk was to commence, namely, on the 25th of September, 1843. If there is a condition—an implied condition—that the ship must then be seaworthy, the policy neither attached then nor at any subsequent time, and the owner's only remedy would be to recover back the premium he had paid to the underwriters. Thus your Lordships are called upon to imply a condition which the parties could not have contemplated, which the assured had no power to perform, and which would effectually defeat the object of the contract. If the loss is caused by any culpable negligence of the shipowner, that may be a defence to the underwriter; but if the shipowner acts with good faith and reasonable diligence, it is surely much more according to the principles of insurance laws, and of common sense, that the risk of the ship not being seaworthy when the liability of the underwriter ought to begin, should be cast upon him, who can easily indemnify himself by demanding an adequate premium for undertaking it.

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The only consideration pointed out for extending the implied condition of seaworthiness to time-policies, which made any impression upon me, is that it does extend to voyage-policies on goods, although the assured can have no control over the repairs or equipment of the ship. But between the assured on goods and the underwriter there is the shipowner, who must be considered the agent of the assured, and he does undertake that the ship shall be tight, staunch, and strong, and every way fitted for the voyage. If

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this undertaking is broken, the merchant has no remedy against *the underwriter, but he obtains a full indemnity by suing the ship-owner, and thus, either with the shipowner or the underwriter, the merchant is secure; so that the implied condition in his policy in no respect interferes with the object of insurance, or with the interests of commerce.

If your Lordships shall be pleased, on the motion of my noble and learned friend, to affirm the judgment of the Court of Exchequer Chamber in this case, it will be definitively established that, by the law of England, in a time-policy such as this, no special circumstances being stated in the declaration or the plea respecting the situation or employment of the ship, there is not an implied condition that the ship should be seaworthy on the day when the policy ought to attach.

The other questions which were debated at the Bar, and which were propounded to her Majesty's Judges, must be open for judicial consideration when they arise; but as your Lordships considered it expedient, for general information and for the advantage of the commercial world, that opinions should be given upon this very important subject, although they would not be binding, I think it right to say that, after great deliberation, I agree with those Judges who think that in a time-policy there is no implied condition whatever as to seaworthiness. I never for a moment could concur in the notion that there was an implied warranty that the ship was seaworthy when it sailed on the voyage during which the policy attached. To lay down such a rule would, I think, be a very arbitrary and capricious proceeding, and, being wholly unsanctioned by usage or by judicial authority, would be legislating instead of declaring the law. I likewise think that it would be very inexpedient legislation, as constant disputes would arise in construing the rule; for in fishing adventures, and where ships are *employed for years in trading in distant regions from port to port, the instances in which time-policies are chiefly resorted to, there would be infinite difficulty in determining what was the commencement of the voyage during which the policy attaches. There would be a similar difficulty as to the *terminus ad quem*, in considering what the voyage truly is for which the ship must be fit.

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I have hesitated more upon the question whether, when a time-policy is effected upon an outward-bound ship lying in a British port where the owner resides, a condition of seaworthiness is to be implied. This might be an exception to the general rule, that in

time-policies there is no implied warranty of seaworthiness, and it is free from some strong objections to the condition of seaworthiness being implied where the risk is to commence abroad. But in addition to the objection that as yet there has been no instance of an implied condition of seaworthiness in any time-policy, and that the general rule is against such a condition, this would be a gratuitous and judge-made exception to the rule. I think it more expedient that the rule should remain without any exception, and, as at present advised, I should decide against the implied condition in all cases of time-policies. There is a broad distinction which may always be observed between time-policies and voyage-policies; but when you come to subdivide time-policies into such where the ship is in a British port and where the ship is abroad, and still more if the residence of the shipowner is to be inquired into and regarded, there would be a great danger of confusion being occasioned by the attempted classification. It is most desirable that in commercial transactions there should be plain rules to go by, without qualification or exception. Marine insurance has been found most beneficial, as hitherto regulated, and I am afraid of injuring *it by new refinements. I should be glad, therefore, that it should be understood, according to my present impression of the law, that there is in all voyage-policies, but that there is not in any time-policies, framed in the usual terms, a condition of seaworthiness implied. This rule, I believe, is adapted to the great bulk of the transactions of navigation and commerce, and when any case occurs to which it is not adapted, this may be easily provided for by express stipulation. My observations upon this last point I offer with the greatest diffidence, after what has fallen from my noble and learned friend, for whose opinion, on all subjects within the whole range of the law of England, I entertain the most sincere respect. I am glad to think that one important question of insurance law is now finally settled.

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Judgment of the Exchequer Chamber affirmed with costs.

DOE D. PADWICK v. WITTCOMB.

(4 H. L. C. 425—434.)

In an action of ejectment the question was, Whether certain lands, known as Kingston Pastures, were part of the manor of Hayling. The lands had been purchased from the Duke of Norfolk. An entry in a book found among the muniments of the Norfolk family was tendered in evidence, for

1853,
June 23.
—
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L.C.
Lord
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the purpose of proving the affirmative of the issue. The entry, which was made by a steward of that family, spoke of an indenture which "recited a lease made by the Earl of Arundel," and which, tracing the lands into the possession of R. H., went on to say that "R. H. demiseth unto, &c., all those pasture grounds lying in Kingston, in the parish of Portsea, parcell of the manor of Hayling:"

Held, that this entry was a mere recital of some document which the writer had seen or heard of, and was not admissible either as an entry made by a person in the discharge of his duty, or as an entry against the interest of the person who made it, nor was it evidence of reputation to prove that the lands were parcel of the manor.

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THIS was a writ of error on a judgment of the Court of Exchequer Chamber (1). Padwick was the plaintiff in an action of ejectment (2) brought to recover possession of a piece of land just outside the town, but within the parish, of Portsea, where a house had been built, of which Wittcomb had become the owner. The cause came on for trial at the Spring Assizes for the county of Dorset, in 1849, before Lord Denman, when it was proved that, some years ago, Padwick had purchased of the Duke of Norfolk the island and manor of Hayling, in the county of Southampton. *This island is surrounded by the sea, and approached on one side by a bridge from a place called Langstone, near to Havant. Padwick claimed, as lord of the manor of Hayling, and contended that that manor stretched into Portsea, and that certain fields once known as Kingston Pastures, were included within its limits. Wittcomb's house, the subject of the action, was alleged by the plaintiff to have been built on a part of these pastures. In 1604, King James I. granted to Thomas, Earl of Arundel, the manor of Hayling, with other hereditaments, in fee. In the third year of the reign of Charles I. an Act was passed annexing for ever to the earldom certain lands and hereditaments, of which the manor of Hayling was one. In the 6 Geo. IV. an Act was passed enabling the Duke of Norfolk (as the successor to the Earl of Arundel of the time of Charles I.) to sell the manor to Mr. Padwick. Receipts for rent between the years 1616 and 1622, signed by "Robert Spiller," who appeared to have acted at that time as agent or steward for Lady Ann, Countess Dowager of Arundel, but who had plainly been connected with the management of the property for many previous years, were put in; and, with the view of showing that Kingston Pastures were parcel of the manor of Hayling, an entry from one of his books, found among the muniments

(1) 86 R. B. 407 (6 Ex. 601).

of the same sort. See *Doe d. Padwick*

(2) There were several other actions

v. *Skinner*, 77 R. B. 559 (3 Ex. 84).

of the Norfolk family, was proposed to be read. The entry was in the following terms :

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“ Tho. Stoughton, by Indenture, bearing date 14^o die Junii, Ano. 12 R. Eliz., resiting one Lease made by Henry Earle of Arundell, dated 9^o Januarii, Ano. 1^o Eliz., unto John Lo. Lumley, for 100 yeares, and one other Lease made by the said Lo. Lumley unto the said Stoughton, and one Humfrey Lloyde, declaring then the said Lloyde to be dead, and hymselfe to be sole seized by survivorshipp, for and in consideration of the summe of lxxv^l, paid unto the said Lo. Lumley by Raphe Henslowe, Gent., *demiseth and graunteth unto hym all those pasture groundes lyinge in Kingston in the Pische of Portzee, pcell. of the manno^r of Haylinge, contayning 22 acres, &c. To have and to holde from the feaste of St. Michell the Archangell, before the date thereof, for the terme of 51 yeares, Reddend p. annu., at the 2 usuall feastes xxvi^o viii^d. A clause of distresse for the rent arere bye the space of one monethe. A reentre for not payinge by the space of 3 moneths, the same beinge lawfullye demaunded, &c. And after endorsed, signed, sealed, and deliv^d, by Tho. Stoughton, Esq^r, 13 Maii, Ano. 13 Eliz., Raphen Henslowe, by deede indented, bearinge date xxii^o Aprilis, Ano. 17^o Eliz., resytinge the former Deedes, assyneth all his interest to Mr. Popiniaye, from whose widowe, by speciall conveyance, S^r Edward Cresswell, Knighte, claymeth x years, yet to come, from the Feaste of S^t Michall last.

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“ Entered 22 Nov. 1610.”

Search had been made, but ineffectually, for the lease which was spoken of in this entry. The entry was objected to either as proof of the facts stated in it, or as evidence of reputation to prove that a place alleged to be Kingston Pastures, in Portsea, was, at the date which appeared at the foot of the entry, parcel of the manor of Hayling. Lord DENMAN rejected the entry on both grounds. A bill of exceptions was tendered, and the case was brought up to the Exchequer Chamber, where it was contended that the entry was admissible on both the grounds already stated ; and further, because it was an official entry of Robert Spiller, made in the discharge of his duty of steward to the Duke of Norfolk, or because it was secondary evidence of the documents referred to in it. The Court of Exchequer Chamber gave judgment overruling the bill of exceptions (1). The present writ of error was then brought.

(1) 86 R. R. 407 (6 Ex. 601).

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Mr. Crowder and Mr. Barstow, for the plaintiff in error :

The evidence here was improperly rejected. There can be no doubt that Spiller's book was kept by a man who was in the service of the Norfolk family, and it was produced from among the muniments of that family, where it had been preserved. The receipts produced, and admitted in evidence, show him to have acted as the steward of the Dowager Lady Arundel, and to have received the money on her account ; and she was shown by other evidence to be entitled to the rents of this property under a settlement made of it by Lord Arundel on her marriage with him. The document is an original entry made by a man in the matter of his business. The first part of it is an abstract of the particulars of a lease with which it was his duty to be acquainted, as affecting the rights of the lady for whom he was acting as steward, and the word "entered" does not intimate that he was making a copy of a document ; but announces the fact of his making the entry for his own guidance in the discharge of his duty. That brings it within the case of *The Duke of Newcastle v. Broxtowe* (1). There the question was whether Nottingham Castle was within the hundred of Broxtowe, and to prove that fact certain ancient orders made by the justices at the Quarter Sessions for the county, wherein it was so described, were held admissible as evidence of reputation, the justices, though not proved to be residents within the county, being presumed by their office to be cognizant of the subject. It is making a distinction without a difference, to say you may give evidence of reputation as to the bounds of a manor, but not of a thing done within the manor.

[*429] (LORD BROUGHAM : Your contention is, that in a conveyance from A. to B., a description of land as parcel of a *manor would, in every other case, be evidence of reputation that it was parcel.)

This was objected to as secondary evidence, because no previous proof of the original could be given. It was not necessary to give proof of the existence of that lease for the purpose of making this entry admissible in evidence, for this entry was made by a man bound by the duty of his office to be acquainted with the matter, and making the entry in the ordinary course of the discharge of his duty.

(LORD BROUGHAM : Without more, you say that whatever purports on the face of it to be a copy, must be taken to be a copy ?)

(1) 4 B. & Ad. 273.

Not quite that; but the circumstances must be looked at to determine the question. Here there could be no doubt about those circumstances. Spiller was unquestionably the steward of Lady Arundel; the entry he made must have been from an original lease; and secondary evidence of a document may be produced without the necessity, in every case, of showing the existence and the loss of that document. *Doe d. Welsh v. Langfield* (1), where, in ejectment for lands which had been the subject of proceedings under an Enclosure Act, the entries of claims made by the Commissioners' clerk in his book were admitted in evidence after his death, though no proof could be given of the existence of those claims themselves. In the same manner the counterpart of a lease has been received in evidence to prove the succession of a party, without any evidence of possession under it. * * *Doe d. Patteshall v. Turford* (2), *Champneys v. Peck* (3), and *Marks v. Laheé* (4), are all authorities *to show that where a person has made an entry in the ordinary discharge of his duty, it is admissible after his death to prove the fact stated in it. It is not necessary that the entry should be adverse to the interest of the party making it, in order to render it admissible: *The Sussex Peerage* case (5). The main point in this case really is this: Did this man make the entry from nothing, or was there an original lease? If there was such a lease, then this entry is fair evidence of its coming from where it does. On the face of the entry itself there is proof of its correctness, for it speaks in 1610 of the lease of 1569 having then ten years to run; and other evidence in the cause showed that there was a holding, such as this entry describes, which did end in 1620.

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Mr. Butt and *Mr. Poulden*, for the defendant in error, were not called on.

THE LORD CHANCELLOR :

My Lords, this is a case in which I do not desire your Lordships to call on the other side to offer any observations, at least not until we have heard the opinion of the Judges on a question which I propose should be submitted to them. (Having stated the circumstances of the case, his Lordship proposed that the following questions should be put to the Judges:)

“In ejectment to recover possession of Blackacre, the lessor of

(1) 73 R. R. 593 (16 M. & W. 497).

(4) 3 Bing. N. C. 408.

(2) 37 R. R. 581 (3 B. & Ad. 890).

(5) 65 R. R. 11 (11 Cl. & Fin. 85).

(3) 1 Stark. N. P. 404.

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the plaintiff, in order to prove that Blackacre was parcel of the manor of H., purchased by him of N., having proved that from a time prior to the reign of Queen Elizabeth, and thence down to the year 1827, N. and his ancestors had been seised in fee of the manor of H., and that Blackacre was parcel of lands formerly known as *pasture lands of Kingston, offered in evidence a certain old book, found among the muniments of title of N., purporting to contain entries made by a former steward of N.'s ancestor in 1610. In the book was an entry stating that, by indenture dated the 14th of June, 12 Elizabeth, reciting a lease dated the 6 Elizabeth, and made by the then ancestor of N. to L. for one hundred years, and another lease made by L. to S., the said S., in consideration of 75*l.* paid to L., demised to R. H. all those grounds lying in Kingston, in the parish of Portsea, parcel of the manor of H. At the foot of this entry are the words 'Entered 22nd Nov., 1610.' Was this entry admissible as evidence of reputation that Blackacre, being parcel of the lands formerly known as Kingston Pastures, is parcel of the manor of H.?"

LORD BROUGHAM :

I entirely agree with the question proposed by my noble and learned friend, which seems to me a very proper form of question in this case, and which exhausts the subject.

MR. BARON ALDERSON :

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Your Lordships having put this question to the Judges, I am instructed by my learned brethren to state their unanimous opinion that this book was not admissible as evidence of reputation. In order to be made so, there should first be evidence of the existence of the lease spoken of in it. Admitting the existence of a lease of the kind spoken of, we do not think that an entry of this sort is admissible, of a reputation existing at the moment such a lease was made, as to the lands mentioned in the lease. It does not appear that the entry was made on the inspection of the lease. It may have been made without any such inspection, upon information given to the steward by some *person who had no positive knowledge of the fact, or who had some interest in giving to the steward such a representation.

THE LORD CHANCELLOR :

My Lords, their Lordships feel very much obliged to the learned

Judges for the very clear way in which they have given their opinion upon this point, and I now move your Lordships to concur in their opinion, and to give judgment for the defendant in error.

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My Lords, this case has been stated in the way which used to be the form in cases in which this House took the opinion of the Judges, but which has not been adopted lately. Here it was necessary to resort to the old form of putting a question, for otherwise it would have been necessary to state the whole record, which would have involved the case in unnecessary complication and difficulty.

The answer to the questions stated by the learned Judges has stripped it of all difficulty whatever. I assume that the book was a book coming from the muniments of the Duke of Norfolk; that it had been written by, or assigned by his steward, in the end of the reign of Queen Elizabeth, or the beginning of the reign of James I. If that was so, and the entry had been an entry of something which he did in the discharge of his duty, it might very well be received as evidence of the truth of what it purported to describe. So, if it could have been made in any way analogous to the counterpart of a lease, something like an admission against the interest of the party who made it, it might have been admissible. But this is not an entry of that kind. This is an entry officiously made by the steward,—if it was made at all by him. It was not an entry of anything he did in the discharge of his duty. It is an entry relating to what he there states to have been done by *some of the under-tenants of the then owner of the manor, in transactions *inter se*, not transactions between him and them. It might be a very convenient piece of information for a steward of the lord who had demised, as the case states, to A., that is to say, to Lord Lumley, for one hundred years, to know what those claiming under him had been doing with the property. But what dealings Lord Lumley had with persons under him, was a matter not within the province of the steward of the Duke of Norfolk to enter upon, and this entry, therefore, can afford no evidence, either on the ground of its being an entry made by him in discharge of his duty, or as proof of reputation of the fact which he purports to record.

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Under these circumstances, I confess I think there can be no doubt whatever that the learned Judge was quite justified in rejecting the evidence. And I come to that conclusion, having considered the case very attentively, from the consciousness that it was

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impossible not to feel that the plaintiff in error laboured under very great difficulties, having had the opinion of all the Courts against him, and having myself been one of those who had in a former stage of this business expressed the opinion to which I now move your Lordships to assent. I have listened to the argument with perfect candour, and if I could have been convinced to the contrary, I should have been ready to be so convinced. But my opinion is unchanged, and I must add that I do not think it is a case in which the House has any reason to regret that the rules of law compel us to this conclusion, because anything more dangerous or more to be deprecated than that parties should look up old entries in the reign of Elizabeth or James I., for the purpose of disturbing, by such evidence alone, the state of things which has prevailed from that time to the reign of Queen Victoria, can hardly be imagined. I therefore *move that judgment be given for the defendant in error.

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LORD BROUGHAM :

I entirely agree with what has fallen from my noble and learned friend. I will only add that this, which appears to be a memorandum made by a steward—we will take him to have been a steward—of the Duke of Norfolk, is no evidence to show that these lands were parcel of the manor of Hayling. The question in this action being parcel or no parcel of a manor, it is not sufficient evidence of reputation that the lands are mentioned in an entry as having been the subject of a demise in some lease under that description.

It was ordered, that the judgment of the Exchequer Chamber, affirming a judgment of the Court of Exchequer for the defendant in error, should be affirmed, with costs.

1853.
July 1, 4, 5.

Lord
CRANWORTH,
L.C.

Lord St.
LEONARDS.

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SADLIER v. BIGGS (1).

(4 H. L. C. 435—470.)

S., on the 5th January, 1746, being tenant in fee simple of lands in Tipperary, executed an indenture, which was, two days afterwards, registered under the Irish Registration Acts. The memorial represented that S. had, by the indenture, demised, or agreed to demise, these lands to C. for three lives, therein named, with “ a clause of renewal after the expiration

(1) *Swinburne v. Milburn* (1884) 9 App. Cas. 844, 54 L. J. Q. B. 6, 52 L. T. 222.

of the said lives thereinbefore-mentioned," provided that C., his heirs, &c., should, "within six months from the death of the last of the said three lives, nominate such life or lives as he would have inserted," and pay all rent, and "the sum of 11*l.* 7*s.* 6*d.* for adding or renewing such life or lives for ever." The memorial was signed by C. alone, and he registered it. In February, 1750, S. executed a settlement in contemplation of marriage, by which he made himself tenant for life only in the estate comprised in the indenture of 1746. In March, 1750, he executed a lease to C., in which the indenture of 1746 was recited, and in consequence of some changes in the lands a change was made in the rent. The lease recited the indenture as a demise to C. for three lives and the longest liver of them, with a covenant to "renew the same for ever, on payment of 11*l.* 7*s.* 6*d.* for renewing the same on the fall of every life, within six months next after the fall of each life." The *habendum* in the lease was for the same three lives; and S. covenanted that, "upon the death or failure of the aforesaid life or lives, or any or either of them" (naming them), and upon C., his heirs, &c., paying "the sum of 11*l.* 7*s.* 6*d.* above the annual rent, within the space of six calendar months, and immediately after the death or failure of such life," and on nomination, &c., "S. and his heirs," &c., would add the life so nominated; "and so in like manner from time to time successively for ever thereafter on the failure of every other several life or lives in the said lease or thereafter to be nominated." Renewals had, from time to time, been made by the successors of S. in the estate, sometimes after proceedings in Chancery to compel the same, sometimes without such proceedings; but in 1845, G., the descendant of S., having absolutely refused to renew, a bill was filed against him by B., who had become *possessed of C.'s lease. The bill prayed for a renewal according to the lease, which B. alleged to have been made in conformity with, and under the obligation of, the indenture of 1746. This indenture could not be produced, but the memorial was tendered and received in evidence. The defendant alleged that the lease was ineffectual to bind the inheritance, as it was made by a person who was, at the moment of executing it, only tenant for life, and he contended that there was no legal evidence of the indenture of 1746. He also relied on the difference between the terms of renewal contained in the indenture and those contained in the lease:

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Held, affirming the judgment of the COURT below, that the plaintiff was entitled to the renewal as prayed; that the memorial was properly admitted as secondary evidence of the indenture; that that indenture was to be treated as an original lease, containing a covenant, under the obligation of which the lease of 1750 was executed; that the obligation entered into in 1746 being by the tenant in fee simple, his performance of it in 1750 was valid, although he was then only tenant for life; and that the acts of the successive tenants of the estate, though not evidence to prove the existence of the covenant, became, when the covenant had been otherwise proved, evidence of the construction which the parties interested had put upon it.

THIS was an appeal against a decree of the Court of Chancery in Ireland, made in a suit which was originally instituted in the Court of Exchequer in equity there, and which was afterwards, under the provisions of the 13 & 14 Vict. c. 51, transferred to the Court of Chancery.

The respondent, in 1845, filed a bill, which was afterwards amended, and to which the younger of the appellants was then

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added as a party, against the appellants, in order *to compel them to grant a renewal of a lease of certain lands held by the respondent under them, according to the covenants and conditions contained in a lease originally granted on the 2nd of March, 1750. The bill, as amended, stated that Charles Sadlier was seized, as in fee, of certain lands called Bellevue, &c., and, by certain indented articles, bearing date the 5th day of January, 1746, and made between the said Charles Sadlier of the one part, and John Chawner, of Ballyguider, in the said county, of the other part, Charles Sadlier demised, or agreed to demise, to John Chawner, his heirs, &c., the towns, lands, and premises described in and demised by the indenture of lease next mentioned, for and during the lives and life of John Chawner, Daniel Alt, and Joseph Palmer, and the survivor of them, at the yearly rent of 9*l.* 10*s.*, payable as therein mentioned, and in which said articles was contained a covenant for the perpetual renewal thereof.

That the respondent has not in his possession or power the said articles, but believes same have been long since lost or destroyed, but a memorial thereof, duly perfected by said John Chawner (1), was duly registered, in the proper office for registering deeds in Ireland, on the 7th day of January, 1746, which said articles are stated in said memorial to contain "a clause of renewal, after the expiration of said lives therein-before mentioned, provided said Chawner, his heirs, executors, administrators, and assigns, should, within six calendar months, to be computed from the death of the last of the said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as well all rent and arrears that should be due for the half-year after the fall of such life, as the sum of 11*l.* 7*s.* 6*d.* for adding or *renewing such life or lives for ever," as by the said original articles, or a counterpart thereof, in the possession of the defendant, Thomas Sadlier, had the plaintiff the same to produce, or by the said memorial, or an attested copy thereof, when produced and proved, will more fully and at large appear.

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The bill then alleged that, by lease and release dated 2nd March, 1750, between the said Charles Sadlier of the one part, and the said John Chawner of the other part, after reciting a lease by Sadlier's father, dated 1st October, 1724, to John Chawner and Daniel Alt, and a lease from Colonel Thomas Butler, and that by the death of

(1) Chawner's name alone was signed to the memorial. His signature was duly attested by two witnesses.

Sadlier's father, the fee-simple and inheritance of said lands descended to said Charles Sadlier, party thereto, and his heirs, and that said Charles Sadlier, party thereto, by the articles of January, 1746, had demised to said John Chawner and his heirs certain lands therein described, to hold the aforesaid towns, lands, &c., for and during the three lives therein named, and the longest liver of them, at the yearly rent of 92*l.* 10*s.*, with a covenant to renew the same for ever, on payment of 11*l.* 7*s.* 6*d.* for renewing the same on the fall of every life within six months next after the fall of each life, and it was by the said indenture witnessed, that the said Charles Sadlier, party thereto, in pursuance of said indented articles, and for the considerations therein mentioned, demised, &c. unto the said John Chawner, his heirs and assigns, All that, &c., excepting thereout unto Charles Sadlier, his heirs, &c., all mines, &c., and also full and free liberty to hunt, hawk, fish, and fowl, &c. To have and to hold all and singular the said demised premises, with their appurtenances (except as before excepted), to the said John Chawner, his heirs and assigns, from the first day of November then last past, for and during the lives of said John Chawner, Daniel Alt, *and Joseph Palmer, and the survivors and survivor of them, and for and during the natural lives and life of all and every such other person and persons as by virtue of the clauses and covenants for perpetual renewal thereafter contained, should, from time to time, successively and for ever thereafter be added to said demise, he, the said John Chawner, his heirs, and assigns, yielding and paying therefore and thereout unto the said Charles Sadlier, his heirs and assigns, the yearly rent or sum of 90*l.* 8*s.* (1), then currency, payable half-yearly, &c.; and Charles Sadlier did thereby, for himself, his heirs, and assigns, covenant, promise, and agree, to and with John Chawner, his heirs and assigns, that upon the death or failure of the aforesaid life or lives of the said John Chawner, Daniel Alt, and Joseph Palmer, or any or either of them, and upon the said John Chawner, his heirs or assigns, first paying or causing to be paid unto the said Charles Sadlier, his heirs or assigns, the sum of 11*l.* 7*s.* 6*d.*, then currency, over and above the annual rent therein-before reserved, within the space of six calendar months next, and immediately after the death and failure of such life, and upon the nomination of the life of any other person by the said John Chawner, his heirs or assigns, within the said six months, to the

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(1) The sum had been altered by agreement, Sadlier having lost his interest in a small part of the property.

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said Charles Sadlier, his heirs or assigns, to be put or inserted in the place or stead of the person so happening first to die as aforesaid, that then the said Charles Sadlier, his heirs or assigns, should, and would, within the said six calendar months from the death of such person so happening first to die as aforesaid, add and insert to the time and term of said lease the life of such person so to be nominated in the place and stead of the person so happening first to die as aforesaid, declaring the life so added in lieu of the life so falling, *to be, with the life and lives then in being, the three lives during which the said estate should be then to continue, and so in like manner from time to time successively for ever thereafter, on the failure of every other several life or lives in said lease then nominated, or thereafter to be successively nominated as aforesaid, and upon the like payment of the sum of 11*l.* 7*s.* 6*d.*, then currency, and upon the like nomination of any other life successively to be added in lieu of every several life so failing as aforesaid, within the space of six calendar months as aforesaid, that the said Charles Sadlier, his heirs or assigns, should, and would, within the said six months next after the failure of every other such several life, so to be nominated as aforesaid, add and insert to the term of said lease, from time to time for ever, the several life or lives of such person or persons to be nominated in the place and stead of the life or lives of the several person or persons so successively happening to die, as aforesaid, and which indenture of demise was duly registered in the proper office for registering deeds in Ireland, as by the said indenture, now in plaintiff's possession, ready to be produced and proved, will more fully and at large appear.

It appeared by the statements in the bill and answer, and by the evidence in the cause, that on the 1st of February, 1750, Charles Sadlier executed a settlement in contemplation of marriage, by which the fee was vested in other persons for the purposes of the intended marriage, and he became only tenant for life in the reversion. This deed was registered on the 10th of June, 1750. The marriage-settlement itself was executed on the 5th June, 1751. The lease which had been executed by C. Sadlier to Chawner in March, 1750, was not registered till the 1st of August, 1752.

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Charles Sadlier died in 1756, and the estate then vested *in his son Thomas Sadlier, an infant, and Chawner's interest having been transferred to Benjamin Biggs, and a life having dropped, Biggs, upon the 8th of February, 1766, exhibited his petition to the

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Court of Chancery against Thomas Sadlier the infant, and the Rev. Ralph Grattan his guardian, praying to be declared entitled to a renewal. An order for renewal was made on this petition, and the renewal was ordered to be executed by the guardian of the infant on the infant's behalf, and a lease was duly executed by the guardian in 1770, in compliance with that order. The interest of Benjamin Biggs afterwards became vested in George Biggs, and another life having dropped, he, in 1779, filed his bill against Thomas Sadlier, who had in the mean time attained his full age, praying for a renewal. The claim was at first resisted, but T. Sadlier, on the 6th of March, 1782, submitted to execute a renewal, and this renewed lease was made for the life and lives of three persons therein named, and the survivor of them, and contained a covenant by T. Sadlier for the perpetual renewal thereof. Other renewals took place on the 21st November, 1797, and the 28th May, 1814. This last renewal was executed by the father of the elder appellant to the father of the respondent. On the 30th of April, 1844, the appellant served on the respondent's elder brother (then the tenant in possession) a notice to quit the premises included in the lease of 1750; and on the 22nd of August, 1844, the respondent, who had then come into possession, served on the appellant a notice to execute a renewal of that lease, by substituting a life in the place of that of the respondent's father, deceased, and tendered the rent up to the last rent-day, and also the renewal fine. The renewal was not executed, and on the 4th of June, 1845, the respondent filed his bill in the Court of Equity Exchequer in Ireland against the appellant, and thereby *prayed that the appellant might be decreed to execute a renewal, pursuant to the covenant contained in the original lease.

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The appellant, in August, 1845, put in an answer, relying on the certain grounds of defence which were afterwards, with others, included in his answer to the respondent's amended bill. One of these grounds of defence was, that his eldest son, Thomas Sadlier the younger, was the first tenant in tail, in reversion, to the lands expectant on his, the life-estate of the appellant.

The respondent filed an amended bill in May, 1846, by which he made Thomas Sadlier the younger a party defendant as first tenant in tail of the reversion. He also put in issue the articles of the 5th January, 1746, alleging their loss, and relying on the memorial thereof, executed by Chawner, and duly registered on the 7th January, 1746, in which memorial an abstract of the alleged covenant for perpetual renewal, as contained in the articles of the

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5th January, 1746, was set forth. The respondent, in the said amended bill, also put in issue an action of ejectment brought in Michaelmas Term, 1844, in which action the respondent had given consent for a judgment, under the belief that the renewal of May, 1814, which had been executed by a tenant for life only, afforded no effectual defence at law against the legal title of Thomas Sadlier the elder. The amended bill prayed that the respondent might be declared entitled to a renewal of the lease of the 2nd March, 1750, pursuant to the covenant contained in the articles of the 5th January, 1746, and in the said lease itself.

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The appellants, by the answer to the amended bill, relied on additional grounds of defence: first, they denied that the articles of the 5th January, 1746, had ever existed, or if they had, contended that upon the true construction of such *articles they did not contain any covenant for perpetual renewal, and admitting that a memorial to the effect stated in the bill existed in the office for registration of deeds in Ireland, the appellants relied as an objection against such memorial being received in evidence against him, that it never had been executed by Charles Sadlier the covenantor; and that the affidavit as to the execution of the alleged articles and memorial was made by Henry Chawner, [who was] the son of John Chawner, and who had a direct interest in sustaining the alleged articles; secondly, that as the memorial was not executed by Charles Sadlier, and as the possession of the demised premises by John Chawner, and those claiming under him, was capable of being explained under and as referable to the lease of the 2nd March, 1750, independently of the alleged articles, that the memorial afforded no sufficient evidence of the existence and contents of such alleged articles against the appellant, claiming under the marriage settlement of the 1st February, 1750, by which, and before the execution of the lease, Charles Sadlier had become tenant for life only, in the reversion; thirdly, that even supposing the memorial to be admissible against appellants as evidence of the existence and contents of such alleged articles, yet the clause or covenant for renewal contained in it was not a covenant for perpetual renewal but was a special covenant for a single renewal only, after the death of all the lives in the alleged articles named, that the clause was not sufficiently certain as to the terms of any renewal, except a single renewal, or as to the amount of the fine to be paid on any further renewal, or whether a fine was to be paid on the further renewal of each new life, or for three new lives; also that all the

lessors in the subsequent renewals were, by virtue of marriage settlements under which appellants claimed, tenants for life only, without any power of leasing *beyond a limited period, and therefore that they were not bound by the admissions or statements made by any of these parties, or by the execution by those parties of the several renewals.

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The cause was fully heard, and evidence received on both sides. The appellants objected to the memorial of 1746 being received in evidence on the ground set forth in the answer to the amended bill. The objection was overruled, and the memorial admitted in evidence. On the 15th of November, 1847, a decree was made declaring the respondent entitled to a specific execution of the articles of the 5th January, 1746, and to a renewal of the lease of the lands comprised in the said articles, at the yearly rent of 90*l.* 8*s.*, and a renewal fine of 11*l.* 7*s.* 6*d.* on the fall of each life, and so *toties quoties* for ever on the fall of any one life. And it was referred to the Remembrancer to settle the form of a renewal, and to ascertain what lands were included therein. This last direction was occasioned by a question whether certain lands called Gurtmunga were a sub-denomination of the lands of Bellevue, or were so reputed at the time of the execution of the articles in January, 1746. On the 4th June, 1850, the Chief Remembrancer made his report, stating the amount due for rent and fines, and declaring Gurtmunga to be part of the lands included in the articles. On the 11th June, the appellants filed exceptions to the report, and the equity jurisdiction of the Court of Exchequer in Ireland having been in the meantime, by the provisions of the Act 13 & 14 Vict. c. 51, transferred to the Court of Chancery there, the exceptions came on to be heard in that Court, and by an order, dated 5th February, 1851, the exceptions were overruled. It was this order that was appealed against.

Mr. Roundell Palmer and *Mr. Bovill* for the appellants:

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The respondent's case now rests on the articles of January, 1746. But there is no evidence of those articles except in the memorial. That memorial is not admissible in evidence; but if it was, it would not sustain the respondent's case, for it does not contain terms consistent with a claim for a perpetual renewal. [On this point they cited *Brown v. Tighe* (1).]

A registered memorial can only be evidence against those who registered it, or those who claim under them: [*Wollaston v.*

(1) 37 R. B. 150; see p. 166 (2 Cl. & Fin. 396).

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[446] (LORD ST. LEONARDS : Suppose the loss of an original deed proved, as the original must be produced and indorsed at the time of registration, the question would be, whether the register would not be evidence of the contents of the original deed, unless it was
 [*447] shown by other means that *there was a discrepancy between them, especially if it was found that parties had been acting for upwards of a century in obedience to the provisions of the supposed instrument.)

[On this point they cited *Baynham v. Guy's Hospital* (2), where it was expressly decided that a legal instrument is not to be construed by the acts of the parties.]

[449] The *Solicitor-General* (Sir R. Bethell) and Mr. Glasse, for the respondents, were not called on.

THE LORD CHANCELLOR :

[*450] In this case your Lordships have heard from the counsel on behalf of the appellants a statement of the grounds upon which they rest their case ; and after listening to their arguments *I am prepared to advise your Lordships that it is not necessary to call upon the respondents, because it appears to me that their case is established beyond all reasonable doubt, and that nothing which has been urged upon the part of the appellants has at all tended to induce the opinion that the decree pronounced below is in any respect erroneous.

(His Lordship here stated very fully the circumstances of the case.)

The case, therefore, is, that there has been for now more than a century a continued line of renewals, from time to time, since 1750, and the respondent seeks to have a renewal now decreed in his favour, and a decree to that effect has been made by the Court of Chancery in Ireland.

In order to show that the plaintiff was not entitled to have that renewal, the case relied upon by the appellant is this : he says that at the time of the original lease (that which I have treated as such), the lease of the 2nd March, 1750, Charles Sadlier, who made it, and entered into the covenant for perpetual renewal therein contained, was not the owner of the fee-simple, and therefore not capable of

(1) 60 R. R. 517 (3 Man. & G. 297).

(2) 3 R. R. 96 (3 Ves. 295).

binding the parties who succeeded afterwards to the property—that he was in truth only tenant for life; and that fact was sought to be established by showing, that a month before the execution of that lease, namely, on the 1st February, 1750, Charles Sadlier had made a marriage-settlement, whereby he had settled, *inter alia*, the lands in question upon himself for life, with remainder to his first and other sons in tail, so that being only tenant for life, he could not enter into any valid covenant which should bind the remainder man or affect the inheritance. The appellant further contends, that that has been the sort of estate existing all along, that no person who has executed any one of these renewals had any power so to do.

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My Lords, that case is met in this way. True it is that Charles Sadlier, at the execution of the lease of 1750, was only tenant for life; but still he was not inaccurately described, as between himself and the lessee, as being the party having the fee-simple; because, up to within a month before the time of his executing the lease he had been seised in fee, and four years previously he had bound himself by what may perhaps be designated as a lease (but which seems to have been treated as an imperfect lease, because it contained a covenant that the parties would make a perfect lease afterwards), to grant the lease in question, so that although he was legally, in March, 1750, only tenant for life, still he was tenant for life subject to a right on the part of the lessee by an obligation, entered into before he parted with the fee-simple, to make a perfect and renewable lease. The question is, whether that is made out to be the case or not? If it is, there is an end of the appeal. It appears to me to be abundantly shown that that is perfectly and satisfactorily made out. The lease of the 2nd March, 1750, appears as a lease between Charles Sadlier of the one part, and John Chawner of the other part, and the former demises to the latter, reciting the articles of agreement of 1746, with a clear covenant for renewal. (His Lordship read it.)

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Now that is a covenant made by a party who is truly said to have been at the time only tenant for life; but he there says he made it pursuant to an obligation under which he had come by virtue of the previous agreement. Is that or not made out to be true? In order to show that it is true, I will not, in the first instance, look backward to what evidence there is *ab ante* of the existence of that prior instrument; but I will, by the most legitimate mode of reasoning, go down to a future time, and see whether what the parties have been doing during the last century, for I *may call it

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so, is or not consistent with any other hypothesis than that there was an obligation upon Charles Sadlier to make the lease in question.

What is the first thing that we see took place after this instrument of 1750? Charles Sadlier, the party to the deed of 1750, died in 1756. Two of the lives fell in about the beginning of the year 1769, at the time Thomas Sadlier, who was tenant in tail, then in possession, was still an infant. An application was made to the Court of Chancery in Ireland to compel him or his guardian to execute a renewal of the lease. That could only have been upon the footing that for some reason or other the covenant bound him. Now the covenant did not bind him if it was only a covenant made by his father as tenant for life; but it did bind him if the covenant was, as it represents itself upon the face of the instrument, a covenant which he was bound to enter into by reason of a prior obligation contracted by him when he was tenant in fee-simple. It is plain that the view taken by the Court of Chancery in Ireland was, that he was bound by that obligation, because the Court ordered the guardian to execute a renewal. Some time before the year 1782, another life dropped, namely, the life of Daniel Alt. Now, what were the rights of the parties then, supposing nothing except that renewal to have happened between 1750 and 1782? Supposing nothing else had happened, we have Thomas Sadlier (who had then arrived at his full age), the son of Charles Sadlier, being the absolute owner, for so I must call him, of the property, since he was tenant in tail in possession, applied to that he might execute a new lease in pursuance of his father's covenant, and proceedings were instituted to compel him to do so. It does not appear that those proceedings ended by a decree; but, as far the tenant was concerned, they ended in that which was just as good to him as any decree, *namely, in the fact that Sadlier was advised to acquiesce, and, being tenant in tail, he executed a lease pursuant to his father's covenant, reciting it and treating it as a valid covenant, and as one which bound him.

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My Lords, I have said he was tenant in tail in possession. Now I am aware of the argument which was pressed upon your Lordships, that he was not really tenant in tail in possession, because he had, in the mean time, dealt with the property by entering into marriage articles in 1773, so as to make his position no longer that of a tenant in tail in possession. He had, as it appears, executed articles before his marriage, in the sense that he had signed some paper; but he was an infant at the time, for you find in the proceeding

instituted against him previously to his granting the lease of 1782, a bill being filed against him, that he by his answer admits that he attained his age of twenty-one years in the year 1774. Now the articles are dated in the year 1778; he was therefore a minor at that time, and no articles could bind him as to his inheritance at all. He was therefore legally tenant in tail subsequently to that obligation, so far as it was an obligation. He had bound himself upon his marriage, by certain articles, to make a settlement of the property under which he would no longer have been tenant in tail; but even if the articles had been executed by him after he had attained his age of twenty-one years, I do not see how they could have affected the case. We have no evidence of what these articles were, except from the memorial of them. I do not stop to inquire whether that is legitimate evidence upon the subject or not; I will assume it to be legitimate. We have a memorial of these articles, which was put upon the register shortly after the execution; and all that appears upon the memorial is, that he had by the articles stipulated to secure a jointure to his wife, and created a trust term of two hundred years; I do not know *for what reason, unless, as it appears afterwards, for the securing a portion to his younger children. But all the evidence we have of any articles of agreement, is of articles which do not affect the ultimate right of the tenant in tail. It appears to be perfectly clear that, being tenant in tail, he executed a renewal lease in 1782 to the holder of the existing lease, Benjamin Biggs; doing so by a recital which states his obligation to do it by reason of that which had been stated as the obligation in the two preceding instruments, namely, the deed which had been executed by Charles Sadlier.

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He was at this time, certainly, only tenant in tail; but it appears by the evidence that, in the year 1795, upon the coming of age of his eldest son, or some time after his eldest son had come of age, he made a settlement of the property, with the concurrence of his eldest son, and in order to give complete effect to that settlement he covenanted to levy, and afterwards did levy, a fine, and suffered a recovery to ensue to the uses of that settlement; but saving and confirming, in words, all the previous leases made by parties who had perfect power by their settlements to make them. There was, therefore, express confirmation of this lease; but I think that, independently of that, it is quite clear, upon ordinary principles, that the lease was binding. A party being tenant in tail, and making a lease for a valuable consideration, and afterwards levying

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a fine, and suffering a recovery, would by these acts do that which would enure to confirm that lease, even if there had not been these words. But those words appear to me to put it beyond all doubt that it was his intention to confirm it as far as he was able so to do. That is the way in which it stands. The original lease was again renewed in 1814. The result is, that throughout all this long period of time, about a century, the parties have been all dealing upon the footing that one was entitled to claim, and *the other was bound to grant, renewals of leases which, if the contention now insisted upon by these appellants was well-founded, might always have been successfully resisted by the party that was required to grant the lease. It was evidently much to the interest of every one of these parties to do so; because I see by the different instruments given in evidence, the sort of consideration that was paid from time to time; there was one case in which 5,000*l.* were paid for the leasehold interest, so that the sum of 11*l.* 7*s.* 6*d.* is wholly absurd as being the value, or anything like the value of a renewal, and the renewal can be accounted for upon no other ground but that of its being made under the force of the obligation. It appears to me that there are the most satisfactory circumstances tending to show what the rights of the parties are: there are, long enjoyment, the same dealing with the property for a very great period, during the whole of which it was the interest of one party to resist that which, nevertheless, he from time to time performed.

It is argued that there is no evidence that we can look at as proof of the prior instrument relied on by the respondent. Although referred to and memorialled, it is said not to be, because of certain technical reasons, or substantive reasons, if you please, admissible in evidence. Why not? The covenant in the deed of 1750 is perfectly sufficient evidence of it, if it is true. Now, in order to see whether it is true or not, I have already looked through all the subsequent transactions; but if that is not sufficient, may I not look at all the circumstances attending the execution of the covenant, and see whether, conjointly with that or preceding it, there were not circumstances tending to prove the truth of that statement, that he was bound by the prior covenant? I am clearly of opinion that I am so entitled, and if I am entitled to look at everything which enters into the statement of the circumstances, I ask, was the statement contained in *the deed of 1750 true? If it was true, what would you expect to find? Why, you certainly would find upon the register a memorial of that old deed, signed,

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not by Charles Sadlier, the lessor, but by Chawner, the lessee, it being invariably the lessee or the purchaser who in such cases registers the memorial, and not the party from whom the estate has passed. If that is so, it brings us back by the most legitimate course to the memorial. Let us then see what that memorial contains.

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And this brings us to the second point insisted on upon the part of the appellant. It is said when you look at the memorial of the original instrument, the alleged foundation of the subsequent deed in 1750, you do not find in this memorial such a covenant as the deed of 1750 represented as being made; I think there are two perfectly sufficient and satisfactory answers to that. In the first place, I do not see any substantive difference between the two. I take it that the memorial is a literal copy of the instrument of which it purports to be a memorial. What is it? It is a lease. The parties treat it as an agreement for a lease, the yearly rent payable so and so, with a clause of renewal after the expiration of such lives, provided Chawner, then the lessee, his heirs, executors, administrators, or assigns, should, "within six calendar months, to be computed from the death of the last of the said three lives, nominate and appoint such life or lives as he or they would have inserted in any lease to be made thereof, and paying as well all rent and arrears that should be due for the half-year after the fall of such life, as the sum of 11*l.* 7*s.* 6*d.*, for renewing or adding such life or lives for ever." I read "for ever," coupling it with "of renewal," thus: "of renewal" (put all the rest in a parenthesis) "for ever." That is the only meaning of the parties—there is no other; the terms are to renew it for ever. There is indeed a discrepancy between *the memorial and the lease, for the memorial appears to state that there was to be no renewal till after the first batch of lives—all the first three—had expired. The parties might stipulate that the renewal should take place upon these terms, namely, no renewal till after the first three lives, and then a renewal upon the falling of every life afterwards; it might be so, but I do not believe that was the meaning. If it was, however, that is immaterial now; it only shows that at the first renewal, when only two lives had fallen in, the parties were renewing when they were not bound to renew, but that does not interfere with what happened afterwards, when, under the terms of this deed and the covenant in the lease of 1750, the parties were from time to time parties to fresh renewals. Therefore it appears to me, for all

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practical purposes, that there is no substantial, or indeed any, difference whatever between the covenant stated in the memorial, and the covenant stated in the deed of 1750.

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But I think there is another perfectly satisfactory answer to this part of the case, namely, that if there is a discrepancy, and I must choose between the two deeds, the parties have enabled me by their own acts to make the proper choice. They have been acting upon the covenant as if the covenant, as represented in the deed of 1750, was a correct covenant. Is that so? Suppose for a moment that there is a difference. I say there is none; but if there is, it is perfectly competent for me to say that I believe that is the covenant and not the other. *Mr. Roundell Palmer*, in arguing this case, supposed that by so doing we should be violating the rule, which is a perfectly well established rule, and consistent with very good sense, and which was established in the case of *Baynham v. Guy's Hospital* (1) overruling the case *which was sent by Lord BATHURST for the opinion of the Court of Queen's Bench (2), namely, that you cannot construe a deed by the acts of the parties. Certainly not, that is to say, if there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it. But what is this instrument here? It is a memorial that is in the nature of an abstract, or a representation of the parties of what the covenant was, and when I see what the effect of it is represented to be in the deed of 1750, four years afterwards, and find that that representation has always since been acted upon, the inference I arrive at in point of fact is, that it is not correctly represented in the memorial, but has been more accurately stated in the deed of 1750, when the parties were to act upon it, and it has so been acted upon invariably ever since.

Upon these grounds, it appears to me perfectly clear that the Judges in Ireland arrived at a satisfactory conclusion when they came to the result that the respondent was entitled to renewal of this lease in the terms of the deed.

I should notice that the rent, as stated in the memorial, is different from the rent now paid; but that is all explained in the deed of 1750, because it seems that the memorial, in reciting the subject-matter of demise, comprehended certain acres called Butler's Acres, which had afterwards lapsed, and then that some reduction was made in the rent.

(1) 3 R. R. 96 (3 Ves. 295).

(2) *Cooke v. Booth*, Cowp. 819.

Then the only other question raised, but which has been abandoned, whether a sub-denomination called Gurtmunga was included in the lease; it is perfectly clear that it was; so the Master has found, upon evidence which satisfied him, and there is no objection to that. Upon the whole, I *am clearly of opinion that the judgment of the Court below was perfectly right, and shall move your Lordships that it be affirmed.

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LORD ST. LEONARDS:

My Lords, I entirely agree with my noble and learned friend in the conclusion at which he has arrived, and I think it only necessary to look at the circumstances connected with the deeds, in order to show that there is really no question to be discussed. The whole case shows that there is no point to be decided, after the facts stated by the appellants are known.

The points made before your Lordships have been, first, with reference to the evidence of the memorial of 1746, that is, the operation of that evidence; secondly, as to the construction of the covenant for renewal stated in the memorial, contrasting that with the covenant contained in the lease of 1750, the appellants insisting that, in consequence of the discrepancy between the two covenants, the one must have been released and a new obligation created by a contract between the parties; and the last point is, that, at the different times when the leases—six, I think, in number—successively were granted, the persons who granted them had not a sufficient estate to bind the inheritance of the present appellants.

It has been made a great question in reference to the memorial, which is signed only by the party who takes the interest, whether that of itself, by its own force, shall be considered as binding the estate of the grantor? That is a totally different question from that which is now before your Lordships, because here the question is whether or not the memorial can be considered as secondary evidence of the contents of the instrument of 1746; and considering the length and nature of the deeds by which it has been recognised, *and considering the statute itself under which that memorial was enrolled, and the proof which accompanies that memorial, and bearing in mind, too, that of course every memorial is signed by the person who takes the interest, because it is he, and not the grantor, who wants the protection of the register, I certainly am of opinion—and I think the authorities will not impeach that opinion—that this memorial is good secondary evidence of the contents of

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the deed of 1746, it being proved upon search that the deed has actually been lost.

It is not necessary to go through the cases ; *Scully v. Scully* (1) was referred to on this point. I was myself counsel in that case, when it was in this House, and I see it mentioned among the cases cited in the Court below, but without reference to that question, which therefore I must take for granted was considered as settled. I have very full notes of the argument upon both sides, and I find no mention of argument upon that point. I must therefore assume that that question was not seriously agitated, because if it had been, I think I should have noticed it as one of the points which had been seriously discussed, and decided.

If you look at the register of the memorial, you will find a witness, according to the requisition of the Act, expressly swearing that he is a witness to the articles themselves, and to their execution by "the above-named parties;" that he saw the "said John Chawner duly execute the above memorial;" and that his name was put as a subscribing witness, and that he delivered it to the register on the 7th January, 1746. So that you have an affidavit put upon record, under the authority of the Act of Parliament, as to the execution of the memorial necessary to secure the title of the person taking from the grantor, and also as to the actual execution of that deed which is no longer forthcoming; that is proved by evidence taken in the course *of the case. Then the question is, the deed being lost, and the possession having gone for a century according to that deed, whether or not that memorial is secondary evidence of its contents? I confess I should be ashamed of the law of England if such evidence as that could not be received from necessity as secondary evidence.

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But this case does not depend upon that mere question of secondary evidence. At the same time, however, I must point out to the appellant that his argument entirely bears against himself, because, unless he can set up the articles of 1773 against the lease of 1782, he has not a shadow of a case to rest upon. But then his only proof of the articles of 1773 is by a memorial of exactly the same tenor as the memorial of the deed of 1746, and therefore, if he prevailed upon that point as to the deed of 1746, he could not at all remove the force and validity of the lease of 1782 by the supposed articles of 1773, for he would then by his argument entirely remove those articles out of the case. His argument, therefore,

unfortunately for him, is a two-edged sword, which, whilst it may damage his adversary at one moment, destroys himself at another.

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It is said that the lease of 1750 must be supposed to be a new contract, because there were the same lives in it that were in the articles of 1746, and that the renewal was before the dropping of the lives. The lease explains why that took place. The lease of Butler's Acres had fallen in; there was consequently a division of the property, and it became necessary to have separate leases. That therefore accounts for what I may call the repetition of the lease of 1746 in that respect, by a demise for the same three lives, and that was the ground why that lease was executed. There was, therefore, a solemn lease executed, reciting that instrument of 1746, though not in exactly the same terms, which is conclusive to my mind, as the memorial does *not profess to be an exact copy of the covenant; it would not be required to be so under the Act of Parliament, but is a general statement of its effect. When I see that covenant in the instrument of 1746 intended to be carried into effect in 1750, by a person having at that time nothing more than a mere life estate, but who had an estate of inheritance at the time he executed the deed of 1746, I must take for granted that what I find upon the face of that deed of 1750 is a true exposition of the meaning of the covenant of that deed of 1746, which is no longer forthcoming. From that time, 1750 down to 1853, I may say every renewal has been based upon that instrument of 1750. But then it has been said at the Bar that you cannot possibly decree a specific performance upon the lease of 1750, because it would be contrary to the decree, which is for a lease according to the instrument of 1746, and you cannot exclude that deed. That depends entirely upon the state of the pleadings. I understand that the original bill asked for a specific performance of the covenant for renewal in the lease of 1750. To that it was objected that at the time that deed was executed, the grantor was only tenant for life. Then the bill was amended, and the articles of 1746 were put in issue. Then of course the decree was founded on those articles. But there is nothing, according to the principles of courts of equity, which, if this objection could prevail, would prevent a court of equity from giving, if circumstances warranted it, a specific performance according to the lease of 1750.

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Now, if we trace the different leases and the times when they were granted, there may be a question, which it is not worth entering into, how far those leases would have bound the inheritance,

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independently of the deed of 1746, in consequence of the limited nature of the estate of the persons who granted them ; but let us come down only to that *transaction of 1770, when the lease was renewed under the authority of the Court of Chancery in Ireland. That was an application made under the Irish Act of Anne (1), which Act authorised the Court of Chancery or of Exchequer, after full examination of the facts, to direct guardians to grant renewals of leases for lives as the representatives of persons under disabilities. It is clearly impossible but that the whole title must have been then investigated ; and at that time, for aught I know to the contrary, the deed of 1746 may have been produced ; and if I had to direct a jury, I should most certainly say that it must be presumed to have been produced before the Master and before the Court ; because the LORD CHANCELLOR did, during the infancy of Thomas Sadlier, direct his guardian to execute a renewal of that lease ; and that lease was accordingly renewed. Can your Lordships have a doubt that then, when the facts must have been known so much better than they can be now, what was so done was rightly done ? Are we to presume the reverse, and to say that that which was then considered right must now be wrong, because by lapse of time the instrument has been lost which might then have been forthcoming ? To my mind it is perfectly satisfactory that at that period the Court of Chancery was satisfied that it was duly executing the power given to it by the statute, in directing the tenant in tail to dispose of his valuable inheritance by a lease for three lives, under a specific covenant for renewal at a very small fine. Well, then, the inheritance was parted with, that is, the *quasi* inheritance for three lives was parted with, under the authority of the Court.

[*464] Now, without troubling your Lordships after the full *opening of this case by my noble and learned friend on the woolsack, with anything about devolution of title, I come at once to that which would of itself form just as good a title, in connection with the former deeds, as any man ever possessed to any estate in this country. The lessee, Biggs, who claimed under the original lessee, Chawner, filed a bill, I think, in 1779, for a renewal of the lease. Thomas Sadlier, described in the answer to that bill as the tenant for life, did not raise these objections at all ; he raised a collateral issue with reference to whether some property that was in dispute, which had formerly fallen in, was renewable or not ; and he said by his answer, that if he was forced to give a specific performance, he

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trusted it would be only upon the terms which he mentioned with reference to that collateral issue; but in his answer he did distinctly admit, without the slightest qualification, the deed of 1746; he admitted the deed of 1750, and the other renewals; and in no respect attempted to impugn them. What can be said of such things? Suppose it did not bind the inheritance; it is a statement by a man deeply interested, who was called upon to renew, who would lose the benefit of the estate for his life, and whose children would be bound by the renewal unless they could impeach it. Instead of going to a decree, he executed a deed, the first deed that was executed between these parties, and which in point of fact put an end to the suit. That deed recites that it is made between Thomas Biggs of the one part, and Thomas Sadlier of the other part, who had been parties to a suit in which "several proceedings" were had; and then it goes on to say, "It hath been agreed upon by and between the said parties to these presents, that the said lease should be renewed in the usual and ordinary manner, and in case the said Thomas Biggs should be dispossessed of any of the said lands in consequence *of a claim made by one Augustine Duggan, and to support which claim a bill was filed by the said Duggan," then the rent was not to cease, but the tenant was to have compensation; and then, in consideration of a certain sum of money, there being a dispute about timber, Sadlier conveyed to Biggs the timber standing upon the estate. Now that is on the 6th of March, 1782; there is to be a renewal "in the usual and ordinary manner;" no longer any dispute about the deed of 1746, or the interest, or whether the inheritance was bound or not; but this person in possession of the estate, entitled to the enjoyment of it for his life, and his children after him, consents to execute, "in the usual and ordinary manner," a renewal. In the lease made in March, 1782, there is this recital: "Whereas the right of renewing the annexed indenture of lease is now legally vested in the said Thomas Sadlier, and whereas the right of renewal and benefit of the said annexed lease is now vested in the said Thomas Biggs." It is impossible that anything can be more conclusive than that; because, if I am to put it upon the ground that the persons cannot be bound who have granted these leases, yet you would find it impossible to affect a lease, granted as this was, after litigation, and with the full knowledge of all the circumstances. Now, as I understand, though there are so many Thomas Sadliers—I think there were four of them in succession—this Thomas Sadlier was the grantor in the supposed articles of

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1773, and he was the grantor in the settlement of 1784, and I must assume Thomas Sadlier to be at that time entitled to the inheritance he is dealing with, the inheritance which is claimed under him. I cannot, therefore, see where the question is. But these deeds are dated in 1782, and it is said that they are invalidated by the effect of the prior settlement of 1773, the settlement made in contemplation of marriage. Now *the only evidence of that, lying before me at this moment, is the memorial to which I have already referred. If the objection against the memorial of the deed of 1746 should prevail, then those articles of 1773 cannot be read. But I will assume that they can be read. We have nothing, then, but the articles to go by. Those articles are simply and only to provide a jointure of 100*l.* a year for the wife for her life, for which the estates are placed in the hands of trustees as a security. That does not affect the lease of 1782 at all. And when you come to the post-nuptial settlement of 1784, which of course cannot bind and overrule the lease of 1782, I noticed during the argument that there is a curious recital there, as if they wanted, if possible, to make a foundation of something to rest their settlement upon. The recital is in this form : “ That by indented articles of agreement made on the 19th of February, 1773, between the said Thomas Sadlier, party to these presents, of the one part, and the said William Woodward the elder and the said Rebecca, by the name of Rebecca Woodward, eldest daughter of the said William Woodward, of the other part : Whereas a marriage is intended to be had and solemnised between the said Thomas Sadlier and said Rebecca now his wife, he, the said Thomas Sadlier, in consideration of the sum of 500*l.* sterling by the said William Woodward the elder, covenanted to be paid to said Thomas Sadlier, and for other the considerations in said articles mentioned, doth covenant and agree with the said William Woodward the elder, his heirs, executors, and administrators, that he, the said Thomas Sadlier, will settle and convey the several lands therein mentioned and expressed, as near as may be, in reference to the parties concerned in such settlement, who shall be living at the time of making thereof.” I do not perceive from the evidence *that what is there mentioned as expressed and contained in the deed of 1773, is in the memorial of it on your Lordships’ table ; that memorial is strictly confined to what I have told you, namely, providing a jointure for the intended wife. But then it is said that as the lease in 1782, though prior to the settlement of 1784, was subsequent to the settlement of 1773, that settlement bound everybody claiming under

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the settlement of 1784. Well, that is the question; but if you were to follow this up, which it is really a waste of time to do, you would find they have continued executing settlements and renewing leases from time to time down to 1814, always in the terms of, and almost as it were, in connection with the settlement, when it is utterly impossible that the persons granting those leases should not have been aware of the nature of the acts they were doing; and in every one of them it is remarkable that every man who grants a lease assumes to have an inheritance to enable him to do so, and therefore a more scandalous fraud could not have been committed than would have been committed upon those lessees, if the title could be impeached in the way now suggested.

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The settlement of 1784 does not expressly except all leases, but it excepts, in terms, all leases which were *bonâ fide* leases of any part of the property. But the man who made that settlement knew perfectly, of course, that he had two years before granted the lease, after a litigation; clearly, therefore, there was no surprise upon him. It was after a litigation of several years; it was the termination of the litigation, the completion of it, and was in lieu of a decree under it. Indeed he became his own Chancellor, and finding that he had no merits, he submitted to that which was clearly against him, and having executed a lease of the property, he takes care, upon his marriage, not to leave himself open *to any demand for damages by those who might claim under him, his children, or grandchildren and other parties and his intended wife, because he says, "I convey this estate to you subject to any leases *bonâ fide* made." This lease was, beyond all question, *bonâ fide*, and therefore he conveyed the estate expressly subject to the lease of 1782.

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My Lords, the only other question, if question it can be called, is whether, if you are to go back and rely upon the lease of 1746, there was or was not a covenant for perpetual renewal? If there was not, you must reject these words "for ever." They come in awkwardly enough, I admit; but you must reject those strong words if you say there is not a covenant for perpetual renewal. I asked in vain of the learned counsel, who is very competent to give an answer when any can be given, what sense was to be attributed to the words "for ever," if that was not their meaning? He could give no other. Can you reject them? Can your Lordships be called upon as a court of equity to reject those large words, expressive beyond all others that the English language contains? There is no other phrase so fitted to express what the

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parties intended, that this lease is to be renewed for ever. The fines are to be paid for ever; supposing you construe it in that way that the fines are to be paid for ever, that must be of course in consideration of—what? why of renewals for ever; because fines are only to be paid upon the renewals. If, therefore, you consider that those fines were expressly stated as a perpetual payment, that of itself implies a perpetual renewal, upon which alone those fines could be paid.

[*469] A case was cited, upon which I will not detain your Lordships for a moment, viz., *Baynham v. Guy's Hospital* (1). Without saying whether that case was rightly or *wrongly decided, I do not think it has any bearing upon the present. The proviso in that case showed that the parties did not intend to go beyond the lives. That case is one confined to lives, and has no bearing upon this which is now before your Lordships, because there the question simply was whether or not, upon the due construction of the covenant, there was anything more than a covenant for the further assurance of the particular lease which had been granted.

My Lords, I have occupied, I am afraid, more time than the case deserves, but upon the whole I never entertained a clearer opinion in my life than I do upon this case; and I have the satisfaction of agreeing with my noble and learned friend, in coming to the conclusion that the justice of the case is in all respects met by the construction which has been put upon it by the Court below. With regard to costs, there cannot be any sort of doubt that the question raised upon this appeal ought never to have come to your Lordships' House. I therefore entirely agree with my noble and learned friend, that the judgment of the Court below should be affirmed, and I recommend your Lordships to affirm it with costs.

Decree affirmed, without costs.

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It was afterwards ordered, "that the appeal be dismissed, and the decretal order of the 15th November, 1847, and the decree of the 5th February, 1851, be affirmed, with costs."

(1) 3 R. R. 96 (3 Ves. 295).

REG. v. SOUTH-EASTERN RAILWAY CO. (1).

(4 H. L. C. 471—483 ; S. C. 17 Jur. 901 ; affg. 17 Q. B. 485 ; 20 L. J. Q. B. 428.)

Under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 46, a Railway Company has the option, when its line of railway crosses a turnpike road or a public highway (except when otherwise provided by the special Act), either to carry the road over the railway or the railway over the road. A *mandamus* to command the Company to do one of these two things is therefore defective unless it shows, on the face of it, circumstances which establish the impossibility of the Company exercising this option.

Where such a *mandamus* had been issued, and the return had merely traversed that the road was a public road, and the issue thus raised had been found against the Company, and a peremptory *mandamus* had been awarded :

Held, that on a writ of error, the Court of Error being satisfied that the *mandamus* itself ought not to have issued, had properly reversed the whole judgment (2).

IN 1849, a writ of *mandamus* was issued to the defendants, which recited that a railway made by the defendants “crossed, not on a level, a certain public highway, situate and being in the parish of Plumstead, in the county of Kent, called the Plumstead Villas Road, by means of a certain trench or cutting 20 feet deep and 65 feet wide,” and that “the permanent way thereof is laid down therein, and the said public way is thereby cut through and destroyed, and rendered wholly impassable for passengers and carriages.” The *mandamus* then recited that reasonable time had been given to the defendants “to enable them to carry the road over the railway, but that they had refused to do so, and it commanded them “to cause the said public highway to be carried over the said railway by means of a bridge, in conformity with the regulations” contained in 8 & 9 Vict. c. 20, the Railway Clauses Consolidation Act, 1845 (3), the directions in which were then in detail set out. The defendants made a return, “that the said way or road in the said writ mentioned, was not a public highway as in the said writ is in that behalf alleged.” Issue was taken on this traverse. The case was tried at the Summer Assizes at Maidstone,

1853.
June 29.
July 4, 14.
—
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CRANWORTH,
L.C.
Lord
BROUGHAM.
PARKE, B.
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(1) Referred to, *Local Government Board for Ireland v. Rex* [1903] A. C. 402, 410, 72 L. J. P. C. 101, 89 L. T. 277.

(2) There was a question as to costs under the stat. 1 Will. IV. c. 21 (repealed by S. L. R. 1891), upon which the Judges delivered an opinion. This portion of the report is omitted as obsolete.—W. B.

(3) 8 & 9 Vict. c. 20, s. 46. “If

the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width and with the ascent or descent by this or the special Act in that behalf provided.”

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in 1850, before the Lord Chief Baron, when a verdict was returned for the Crown, finding that the Plumstead Villas Road was a public highway. A rule for a new trial was applied for and refused, and judgment was signed in November, 1850. The defendants brought a writ of error in the Exchequer Chamber, and the errors assigned were, that it was not stated that the alleged highway was such at the time of the passing of the Company's special Act,—that no sufficient damage was alleged,—and that by the writ the defendants had not the option of carrying the road over the railway or of carrying the railway over the road, according to the statute (8 & 9 Vict. c. 20); but were deprived of that option. The Court of Exchequer reversed the judgment of the Queen's Bench (1), and the present writ of error was brought on that reversal.

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The Judges were summoned, and Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Cresswell, Mr. Justice Erle, Mr. *Justice Talfourd, Mr. Baron Platt, Mr. Justice Williams, Mr. Baron Martin, and Mr. Justice Crompton attended.

Mr. Bramwell and *Mr. Needham* (*Mr. Raymond* was with them),
for the plaintiff in error :

The point now to be considered is, whether, by the effect of the "Railway Clauses Consolidation Act, 1845," the defendants had an option to carry the bridge over or under the line of railway. It may be admitted that, as a general rule, the 46th section of the 8 & 9 Vict. c. 20, gives them an option; but that general rule is subject to exceptions arising from circumstances. If circumstances alone could decide the question, the depth of the cutting, as set forth on the face of the proceedings, shows that it is absurd to suppose that the defendants can be at liberty to carry this bridge under the railway. Some of the exceptions present themselves in the sections which relate to the heights of streets, and to deviations; for those sections provide for a state of things in which it would be impossible to follow the words of the statute and yet to leave the defendants the liberty of option now contended for.

It is objected to this *mandamus*, that it does not give to the defendants this option; but on the face both of the *mandamus* and return, the two parties have assumed that if the line is to be made at all across this road, it is to be carried over the road. * *

Supposing, however, that the defendants have an option as to the mode of making the road, if there are circumstances which render that option impossible, the parties who set up the claim to the option must show that the circumstances are such in which they could conveniently exercise it. * * *

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Sir F. Kelly and Mr. Willes, for the defendants in error :

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The words of the 46th section give a clear option to the defendants as to the mode in which they shall make the railway cross the road. The special Act constituting this Company was passed on the 8th of August, 1846, and the defendants have by that Act seven years from that date for completing the railway. Within that time they may make any alteration they think necessary, and till then they cannot *be compelled to exercise the option which the statute has given them. They may, likewise, alter the whole line of road, and carry the railway to a spot where no bridge over or tunnel under the road would be necessary. The *mandamus* is, therefore, at all events premature. It is also defective in itself. It cannot be shown on the face of the *mandamus*, as matter of law, arising upon the facts there set forth, that the road could not be carried under the railway; but if not, then the *mandamus* is bad, for the defendants have, under the 16th section of the statute, most extensive powers as to the making and altering roads, &c.; and under the Company's Act they have seven years from the date of the Act to make any necessary alterations.

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Mr. Bramwell [was heard] in reply. * * *

THE LORD CHANCELLOR :

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My Lords,— * * I propose to put these questions to the learned Judges :

1. Whether it appears on the face of the *mandamus* that the defendants in error were by law bound to do the act which they are thereby commanded to do ?

2. Whether, if it does not so appear, the defect is cured by the traverse and subsequent pleadings ?

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3. If the Judges in the Queen's Bench were wrong, what judgment ought to have been given by the Exchequer Chamber ?

Mr. Baron PARKE, in the name of the Judges, requested that they might be allowed time to answer these questions.

Ordered.

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 COMPANY.
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MR. BARON PARKE :

To the first of the questions proposed by your Lordships, I have to give the answer of all the Judges who heard the argument, that, in their opinion, it does not appear on the face of the *mandamus* that the defendants in error were by law bound to do the act which they are thereby commanded to perform.

The duty arises from 8 & 9 Vict. c. 20, sec. 46, which provides (see *ante*, p. 195, n. (3)). Nothing in this case turns upon the latter part of this section. We are of opinion that this section, which, in the ordinary meaning of the language used, directs one thing or the other to be done, and does not say which, clearly gives to the party who is to do the act the election to do which act he pleases. The writ, therefore, ought to have given the election to the defendants, and is invalid, unless it assigns on the face of it some sufficient reason why they are no longer to have the option at the time of issuing it, but are compellable by law to do the act commanded; that is, to make the bridge for the highway over the railway. We think the writ suggests no sufficient ground to deprive them of this option, and therefore does not show that the defendants were bound to do the particular act commanded.

[*479] If the writ had sufficiently stated on the face of it that it was originally impossible, from local circumstances, to carry *the railway over the highway by a bridge, or that it originally was or had become impracticable to do so, so as to comply with the express regulations in the Act applicable to a railway crossing over a road, that might have shown a sufficient obligation to erect the bridge over the railway, and to deprive the defendants of the option which they once had of carrying the railway over the highway.

So also, if it had sufficiently appeared that the defendants had determined their election, by finally fixing the level of the railroad below that of the highway, in such a way that the defendants had no other alternative than to erect a bridge for the highway to go over it.

But we are all of opinion that none of these circumstances sufficiently appears on the face of the writ to justify the mandatory part.

The allegation that a trench had been made of the depth of twenty feet (assuming that to be strictly true), through which the railroad passes, and by which the highway has been cut through and destroyed by the Company, does not necessarily show that it was then impossible to lower the highway, and carry the railway

by a bridge over it, in the exercise of the lawful powers of the Company under the sixteenth section ; nor is the averment, that the permanent way of the railroad is laid down therein, sufficient to show that the defendants have bound themselves finally and conclusively to adopt that level, and that in such a way as to leave no other course open to comply with the Act of Parliament than to construct a bridge over it. Consistently with that allegation, as well as the preceding one, the defendants may still, under that section, carry the railway over the road by a bridge.

This depends upon circumstances connected with the local situation of the highway and railroad, and upon nice questions of engineering, which we are not able to decide. *Some evidence is stated on the face of the *mandamus*, having a tendency to prove the necessity of making a bridge for the highway, but the material allegations are wanting.

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To the second question, whether, if it does not so appear, the defect is cured by the traverse and subsequent proceedings, we answer, that the defect is certainly not cured.

No fact is added by the pleadings. The only effect of them is, that the allegation that the alleged highway was such, is proved, which must have been assumed to be true if it had not been traversed.

Besides, the case of *The Mayor of London v. The Queen in Error* (1), is a decisive authority that even an express admission in the return of a fact necessary to make the writ valid does not supply the defect. I am desired, however, to intimate that my brother COLERIDGE has some doubt about the propriety of that decision.

The remaining question is, if the judgment in the Queen's Bench was wrong, what judgment should have been given in the Exchequer Chamber ?

We all think that the proper judgment has been given in that Court, "that the judgment of the Queen's Bench should be reversed, annulled, and altogether holden for nought ; that the defendants below should be restored to all they have lost by reason of the judgment ; and that the writ of *mandamus* is insufficient in law, and should be quashed."

The judgment of the Court of Queen's Bench is, "that a peremptory *mandamus* should issue, and that Charles Edwards, the prosecutor, do recover his damages, costs, and charges, and costs of increase."

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EASTERN
RAILWAY
COMPANY.

July 14.

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Both parts of this judgment must be reversed. * * *

THE LORD CHANCELLOR :

My Lords,—This case comes before the House upon a writ of error from the judgment of the Court of Exchequer Chamber upon a writ of *mandamus*, that Court having reversed the judgment for the peremptory *mandamus* which had been issued by the Court of Queen's Bench.

The *mandamus*, which was issued at the instance of Edwards against the defendants, commanded them to carry the public road or highway over the railway by means of a bridge. (His Lordship read the recital and the mandatory part of the writ, describing what the bridge is to be, and stated the pleading, the finding of the jury on the fact, and the judgments of the Courts of Queen's Bench and Exchequer Chamber.)

The matter has now been brought before your Lordships. We have had the assistance of the learned Judges, thirteen of whom were present, and they were unanimous in their opinion that the judgment of the Court of Exchequer Chamber was right.

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That being so, it is clearly unnecessary for this House to do more than to say that it entirely assents to the view which has been taken of the case by the learned Judges. It may, however, be just proper to say, that the case, when it is looked at, admits of no doubt; and in coming to this conclusion we are in fact affirming the unanimous opinion of the Judges in all the Courts; for, as far as I can ascertain, it does not seem that the point now before us was ever raised and considered in the Court of Queen's Bench. The question there was upon an issue, in point of fact, which had been improperly raised, which issue was an immaterial issue; but on the determination of which the peremptory *mandamus* seems to have been awarded as of course. But the real question arises upon a single short clause in the Railway Clauses Consolidation Act. That Act provides (his Lordship read the clause). It seems to me that on that clause the defendants have a right either to carry a bridge over the railway or to carry the railway over the road. Now a *mandamus* cannot be right which commands them to do one of those things, unless it appears upon the face of the record that they have rendered it impossible that the other should be done. That certainly is not the case here.

Many ingenious speculations were put forward, and drawings were made with reference to their having cut a trench the depth of

which is stated to be twenty-five feet, and which it was supposed rendered the carrying the railway over the road a matter of impossibility. But that statement is not made as a matter which is traversable. But let the depth of the cutting be what it may, still if it is of any depth, it may be on ground of a certain kind, which not only allowed it to be possible, but rendered it expedient, in spite of there being a cutting of that depth, to carry the road underneath instead of over the railway. Therefore *it is plain that the *mandamus* discloses no impossibility to perform the other alternative allowed by the Act. And if that is so, the *mandamus* compelling the defendants to perform one of those alternatives, they having the option to perform either of them, must be wrong, and consequently ought not to have issued.

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There was a point raised as to what the judgment ought to have been; but the learned Judges are clearly of opinion that the judgment was right, and the peremptory *mandamus* improperly issued. Consequently that judgment ought to be reversed, and in the language of the Court of Exchequer Chamber, which I move your Lordships to affirm, the judgment of the Court of Queen's Bench ought to be reversed, annulled, and altogether holden for nought, and the defendants must be restored to all things which they have lost by occasion of the said judgment, and the writ of *mandamus* is insufficient in law, and must be quashed; I therefore move your Lordships that this judgment of the Court of Exchequer Chamber should be affirmed with costs.

LORD BROUGHAM :

My Lords,—I entirely agree with my noble and learned friend. In this case, upon the point before us, the point upon which we are now deciding, there was no difference of opinion among the learned Judges. The judgment of the Court of Queen's Bench turned upon a question of fact. I entirely agree with my noble and learned friend, that independently of the great weight of the authority of the learned Judges, there is no real doubt upon the question itself.

*Judgment of the Court of Exchequer Chamber affirmed
with costs.*

ANDERSON *v.* FITZGERALD (1).

(4 H. L. C. 484—516; S. C. 17 Jur. 995; revsg. 1 Ir. C. L. Rep. 251.)

1853.
 June 30.
 July 1, 4, 14.
 —
 Lord
 CRANWORTH,
 L.C.
 Lord
 BROUGHAM.
 Lord St.
 LEONARDS.
 PARKE, B.
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F. applied to an insurance office to effect a policy on his life. He received a form of "proposal" containing questions requiring to be answered. Among these were the following: "Did any of the party's near relations die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" To each of these questions F. answered "No." The answers were false. F. signed the proposal, and a declaration accompanying them, by which he agreed "that the particulars mentioned in the above proposal should form the basis of the contract." The policy mentioned several things which were "warranted" by F. The subjects of these two answers were not included in such warranty. The policy also contained a proviso, that "if anything so warranted shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or any false statements made to the Company in or about the obtaining or effecting of this insurance," the policy should be void, and the moneys paid should be forfeited. In an action on the policy:

Held, reversing the judgments of the Courts of Exchequer and Exchequer Chamber in Ireland, that it was a misdirection to leave it to the jury to say whether the answers to the two questions were material as well as false, and if not material, that the plaintiff was entitled to the verdict. The representation being part of the contract, its truth, not its materiality, was in question.

(By the Judges.) A bill of exceptions, which sets forth what a Judge was asked to direct, and alleges that he refused to give such a direction, is informal and bad. A bill of exceptions should state what directions the Judge gave, as it is misdirection, and not non-direction, which is the subject of an exception.

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THIS was a writ of error on a judgment of the Court of Exchequer Chamber in Ireland. Ann Fitzgerald was the administratrix of one Patrick Fitzgerald, deceased. *The defendant Anderson represented the United Kingdom Life Assurance Company. The action was brought against Anderson on a policy of insurance effected with that Company upon the life of Patrick Fitzgerald. The declaration, which was in the usual form, set forth the policy, in which was a warranty that, amongst other things, the assured was not afflicted with any disease tending to shorten life; that he led, and continued to lead, a temperate life, and that he had a sound and good constitution. The policy also contained a proviso, which, after providing against the assured going beyond the limits of Europe, or entering the military or naval service, proceeded thus: "Or if anything so warranted as aforesaid shall not be true, or if any circumstance material to this insurance shall not have

(1) Referred to, *In re Universal &c. Mansel* (1879) 11 Ob. D. 363, 371, 48 *Ass. Co.* (1875) L. R. 19 Eq. 485, 495, L. J. Ch. 381, 41 L. T. 225; *Thomson* 44 L. J. Ch. 761; *London Ass. Co. v. v. Weems* (1884) 9 App. Cas. 671, 682.

been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said Company, or if any fraud shall have been practised on the said Company, or any false statements made to them in or about the obtaining or effecting of this insurance, this policy shall be null and void; and all moneys paid by or on behalf of the said Patrick Fitzgerald on account of this insurance shall become forfeited." The declaration then contained the usual averments of the fulfilment of all matters requisite to be performed on the part of the deceased and his representatives by the terms of the policy, and negatived the doing of any of the matters which might have vitiated the policy.

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The defendant pleaded, first, *non assumpsit*, and secondly, a special plea, setting forth the "proposal and statement" which Fitzgerald had signed, and which contained among others the following declaration, "that none of his near relations had died of consumption, or any other pulmonary complaint, and that his life had not been *accepted or refused at any other assurance office"; and the plea alleged that "it was agreed between Patrick Fitzgerald and the Company that the particulars stated in the declaration should form the basis of the contract between him and the Company, and that if there should be any untrue allegation contained therein, or any misstatement, the insurance should become forfeited, and the policy should be void." The plea then alleged that "the proposal and statement did form the basis of the contract, and that they were false, and contained untrue and unfaithful representations, inasmuch as Patrick Fitzgerald was then afflicted with a disease of the lungs, &c., and that two of his sisters had died of consumption, and that his life had already been accepted at six different assurance offices and refused at six others." The third plea in like manner set forth the statement made by Fitzgerald, as made to Dr. Russell, the medical officer of the Company, and then alleged that the said statement was false, and contained an untrue and unfaithful representation of the facts, (setting forth among others), "that two of his sisters had died of consumption, and divers others of his relations had died of pulmonary complaints," and that he had theretofore made proposals for insurance to other Companies and was insured at divers other offices; and that these statements were made by Fitzgerald to induce Russell to report in favour of an insurance on his life. There were other pleas charging untrue representations

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ANDERSON as to his own state of health. The plaintiff replied *de injuriâ* as to
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 FITZGERALD. the second and third pleas, and took issue on the others.

[*487] The cause was tried before Mr. Justice Ball, at the Limerick Assizes, in March, 1848, when the “proposal” *for insurance was put in evidence, and the facts alleged in the plea as proofs of the falsehood of the proposal and statement were proved; but it appeared that the two sisters who died of consumption were respectively aged sixty-seven and sixty-five. The learned Judge directed the jurymen that they “must not only be satisfied that the various false statements relied on by the defendant were false in fact, and were made in and about effecting the policy, but also that such false statements were material to the insurance, before they could find their verdict for the defendant.” The defendant’s counsel tendered a bill of exceptions to this ruling, on the ground that the jury should have been directed that, if the statements were made in and about the effecting the insurance, and such statements were false in fact, the defendant was entitled to a verdict, whether
 [*488] such statements were or were not material. The verdict *was given for the plaintiff for 450*l.*, the sum secured by the policy. The exceptions were argued in the Court of Exchequer, when the LORD CHIEF BARON expressed an opinion that they ought to be allowed, but Mr. Baron RICHARDS and Mr. Baron LEFROY being of a different opinion, judgment was ordered to be entered for the plaintiff. A writ of error was brought in the Court of Exchequer Chamber, where, by a majority of seven to three, the judgment of the Court below was affirmed (1). The present writ of error was then brought.

[*489] The Judges were summoned, and Mr. Baron Parke, Mr. *Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Cresswell, Mr. Baron Platt, Mr. Justice Talfourd, Mr. Justice Williams, Mr. Baron Martin, and Mr. Justice Crompton attended.

Sir F. Kelly and Mr. Bovill for the plaintiff in error :

The verdict here was wrong, and that was occasioned by an erroneous direction on the part of the Judge. The judgment of the Court below, affirming that direction, cannot be sustained. Fitzgerald was bound to answer all the questions put to him without fraud, and truly. He answered them falsely. * * No question was or could be raised about the materiality of these answers.

If they related, as the plea alleged, to the effecting of the insurance, they were required to be true. * * *

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In *Lindenau v. Desborough* (1) the question of the materiality of a statement was raised, and after that time the forms for effecting life policies were altered to what they are now. The truth or falsehood of a statement is now made to decide the validity of a policy. In *Duckett v. Williams* (2) a statement, untrue in point of fact, though not to the knowledge of the party making it, was held to occasion a forfeiture of the premium. The case of *Geach v. Ingall* (3) decided that where, under proposals like the present, the assured did not state that he had had a spitting of blood, it was a misdirection to ask the jury whether it *was such a spitting of blood as would tend to shorten life, the concealment of the fact being held to be a breach of one of the conditions. These cases were followed by that of *Southcombe v. Merriman* (4), which finally settled that, in all instances, the only question must be whether the statements made in the answers to the questions contained in the proposals were true or false. * * The simple question of the truth or untruth of the statement, not the doubtful question of its materiality, is that by which the validity of the contract must be decided.

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Mr. Napier and Mr. Fitzgerald, for the defendant in error :

* * The correctness of the verdict is not now in question ; but the direction to the jury was right. The question whether it was so or not must depend on the forms of the issues. The plea of *non assumpsit* was in this case quite *sufficient to raise the question of materiality. The pleadings showed the distinction taken in the policy between what was matter of warranty and what was mere matter of representation. The former must be strictly complied with, and if untruth exists as to a warranty, the policy is no doubt void. But that is not so where there is no warranty ; and in such a case the representation must be shown to be material as well as false, before it can affect the policy : *Pawson v. Ewer* (5) and *Bize v. Fletcher* (6).

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The policy itself raises the question of materiality. It recites that certain things are warranted by the assured, and of course that warranty must be strictly complied with. But then it goes on to mention other things which are not warranted, and it does so in a

(1) 8 B. & C. 586.

(2) 39 B. R. 792 (2 Cr. & M. 348).

(3) 14 M. & W. 95.

(4) 1 Car. & M. 286.

(5) Cowp. 785 ; Doug. 11, n.

(6) Doug. 12, n., 284.

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In *Lindenau v. Desborough* (5), Lord TENTERDEN and the other Judges thought that that which was material affected the policy, and that nothing else did so. What is material cannot be left to conjecture; it cannot even be made the subject of doubtful and conflicting evidence; it must be declared in the contract itself to be material: *Campbell v. Rickards* (6). In the case of *Scanlan v. Sceals* (7), the judgment of Chief Baron BRADY shows that where words are not expressly included in a warranty, they cannot be introduced as such by the force of implication.

In the proposals prefixed to this policy there are many things stated; some of these are material, some are plainly not material. It was therefore necessary, especially with reference to the passage in the policy already quoted, for the Judge to ask the jury whether the statements said to be untrue were material or not, for, if not material, they could not affect the plaintiff's right to recover. This was doubly important, because the proposals were not, as in *Scanlan v. Sceals*, incorporated with the policy. * * *

(1) Shep. Touchst. ch. v. tit. 14, s. 6,
p. 87.

(2) 63 R. R. 428 (5 Scott, N. R.
418).

(3) Cowp. 785; Doug. 11, n.

(4) Doug. 12, n., 284.

(5) 8 B. & C. 586.

(6) 39 R. R. 679 (5 B. & Ad. 840).

(7) 5 Ir. L. R. 139, 154.

Sir F. Kelly [was heard] in reply. * * *

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The LORD CHANCELLOR, having stated the pleadings and evidence, [proposed to put to the learned Judges these two questions :]

1. Was it necessary for the plaintiff in error to prove on the trial that the answers given by Fitzgerald to questions 21 and 22, contained in the particulars, dated Kilrush, 17th June, 1846, or either of them, were or was material as well as false ?

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2. If it was necessary for the plaintiff in error to prove the materiality as well as the falsehood of the answers, or *either of them, are the exceptions, so far as they relate to the ruling of the learned Judge on the issues joined on the second and third pleas, or is either of them, sustainable ?

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The Judges asked time to consider the questions.

Ordered.

MR. BARON PARKE :

June 4.

Your Lordships have proposed two questions for the consideration of those of her Majesty's Judges who heard the argument of this case at your Lordships' Bar.

I have to state, that we have considered with due attention the very able arguments both at your Lordships' Bar and in the judgments of the Irish Judges, which are fully reported in the printed cases laid before us, and that we find ourselves unable to agree in the conclusion at which the majority of those Judges have arrived.

The answers referred to by your Lordships were given to two questions put to the assured, Fitzgerald ; the first, whether any of the party's near relatives died of consumption or other pulmonary complaint ? and, secondly, whether the party's life had been accepted or refused at any other office, and if accepted, whether at the usual premium, or with what addition ? To both, the assured answered in the negative. At the end of the list of questions the assured subscribed a declaration to the effect that the particulars should form the basis of the contract between the assured and the Company, and that if there should be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to the insurance should not have been fully communicated to the Company, or if there should be any fraud or misstatement, all the *money paid on account of the insurance should be forfeited, and the policy should be void.

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The first question then submitted to us is, Whether it was

ANDERSON necessary for the plaintiff in error to prove on the trial that the above
 FITZGERALD. answers, or either of them, were or was material, as well as false?
 We are all of opinion that it was not.

This question does not appear to us to turn upon the well-known distinction between warranties and representations laid down by Lord MANSFIELD, nor upon the point whether the declaration above mentioned was either a part of the contract binding between the parties independent of the policy, or meant to be referred to by it. The proviso is clearly a part of the express contract between the parties, and on the non-compliance with the condition stated in the proviso the policy is unquestionably void.

The case therefore resolves itself, in our view of it, as it does in that of most of the Irish Judges, simply into a question of the construction of the proviso itself; and it is upon questions of that nature that different minds are apt to differ in their conclusions, however disposed to adopt the established rules for the construction of written instruments.

By that proviso it is stipulated, first, that if the assured should die on the high seas (with certain exceptions), or should kill himself, or die by duelling, &c., or if anything warranted as before mentioned (and there were several express warranties before stated) should not be true, or if any circumstance material to that insurance should not have been truly stated or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated to the Company, the policy should be void. Thus far the condition applies only to material matters; but it proceeds to declare, obviously *with a view of extending the protection to the office still further, that if any fraud shall have been practised on the Company, or any false statements made to the Company in or about the obtaining or effecting of that insurance, the policy shall be null and void. The latter words probably override the former, and the fraud, as well as the false statement, in order to avoid the policy, must be made in or about the obtaining or effecting of that insurance. These words, no doubt, must be understood not to include a false statement of matters to the disparagement of the applicant for insurance, and tending to render his life less insurable; such a construction would be clearly absurd, and in no way reconcilable with the manifest object of the proviso. The words, however, will clearly include all frauds or false statements made in order to obtain the policy, whether in matters material or not; a consistent construction will thus be given to the whole. The

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proviso, in the first place, provides for the violation of the special matters mentioned in the commencement of it. Next, it requires every material fact not to be misrepresented or concealed, but to be fully and fairly declared. But it goes further. In the anxiety of the Company to protect itself by every precaution, it prohibits any fraud or falsehood whatever to be used in obtaining the insurance. It includes all frauds for that purpose, though not made by concealment or misrepresentation, by word or writing, of material facts, such as fraud in false personation, or in the disguise of the diseases of the applicant; and, lastly, it prohibits every false statement whatever, whether in matters actually material or immaterial, and leaves no room for dispute whether the particular matter to which it related was material or not (which in the case of a dispute a jury would have to decide), leaving the Company to determine entirely for itself what matters it deems material and what not.

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This seems to us to be the obvious ordinary sense of the words used, and there is no reason from the context to give any other than the ordinary sense to them, though they are to be construed as the words of the assurers, and most strongly against them if there is any ambiguity in them. There is no ambiguity in them in this respect. A doubt possibly may exist whether the word "false" is to be understood in the sense of false in point of fact, or morally false, though, I believe, most of us think that it is not to be limited to moral falsehood; but there seems to us to be no doubt that if the statements are false, in whatever sense we understand that word, being used in effecting the insurance, this proviso operates. There then appear to us to be only two questions for the jury on this part of the policy: Were the statements false? Were they made in obtaining or effecting the policy? Whether they are material or not is not a necessary part of the inquiry. It has seemed to two eminent members of the Irish Bench, Mr. Justice MOORE and the then Lord Chief Justice BLACKBURNE, that the materiality of the question was involved in the inquiry whether it was used by the assured to induce the Company to effect the policy. We do not agree with that reasoning. It is true that the materiality of these statements may be sometimes evidence of the purpose with which they were made, and may tend to show that they were made with the object of obtaining the policy, because if immaterial they would not be likely to effect it; but the materiality is not a necessary condition to bring them within the scope of the proviso, if it can be shown that the statements were made in obtaining the policy

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FITZGERALD. and for the purpose of effecting it; and here the terms of the particulars and the subjoined declaration preclude all doubt upon that question; for the truth of the answers is, in the strongest terms, made essential to the validity of the policy.

[499] We therefore answer your Lordships' first question in the negative, notwithstanding the ability shown by the Judges who have expressed their opinion, that the materiality of the answers was a necessary part of the proof.

With respect to the second question proposed by your Lordships, we answer, that the exceptions, on the issue joined on the second and third pleas, are not sustained, and that on a formal ground. The bill of exceptions should have stated what directions the Judge gave, as it is misdirection, not nondirection, which is the proper subject of a bill of exceptions.

This was determined in the case of *McAlpine v. Mangnall* (in error)(1). If it had been stated that the learned Judge told the jury it was necessary on those issues to prove the materiality of the answer, the exception would have been well founded. So it would if the ground of his refusal to put the question in that form had been that all the allegations in the plea should have been proved, and that there was no evidence to that effect; because the plea being, in our opinion, good, as the materiality was not essential, the proof of a part, which if pleaded alone and proved, would have barred the action, was sufficient. It would have been otherwise if the plea had been bad, when every part must have been proved in order to sustain it, and obtain a verdict upon it.

July 14.

THE LORD CHANCELLOR :

After fully stating the pleadings, the evidence, and the proceedings at the trial, said,—The plea upon which the question arises is the old plea of *non assumpsit*, for I need hardly remind your Lordships that the “new rules” of pleading adopted in this country do not extend to Ireland.

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Now, among the particulars constituting that paper which Fitzgerald signed, and which he agreed should be the basis of the contract between him and the Company, there were two questions to which he was called upon to make an answer, and which he did answer. One of them was, “Did any of the party's near relations die of consumption, or any other pulmonary complaint?” To which Fitzgerald's answer was “No.” The other was, “Has the party's

(1) 3 C. B. 496.

life been accepted or refused in any other office, and if accepted, was it at the usual premium, or with what addition?" Again the answer was "No." That meant that an insurance on his life had not been accepted or refused at any other office. Striking out all the other articles from those particulars, the result therefore is, that Fitzgerald agrees that the basis of the contract between him and the Company shall be that he truly represents to the Company that none of his near relations died of consumption, or any other pulmonary complaint, and that his life had never been accepted or refused at any other office.

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A great deal of evidence was given to which it is not at all material to advert, and then, when the learned Judge at the end of the case came to sum up, and to direct the jury as to what were the questions to be considered, the counsel for the defendant called on the learned Judge to give this direction, that if the jurors believed that previously to the making of the policy of insurance, any false statement was made to the Company by Fitzgerald "in or about the obtaining or effecting of the insurance," although they should believe the same was not material to the insurance, they must find a verdict for the defendant on the issue of *non assumpsit*. The counsel repeated this demand for such a direction to the jury, specifically with reference to the statement as to the refusal of the plaintiff's life at another insurance office, and also to the question whether Fitzgerald *had any relations who had died of pulmonary complaints; and as to the general and the specific matter thus required to be presented in that form to the jury, the learned Judge refused to give the direction so required. (His Lordship here read the exception, and the allegation as to the form of the direction actually given to the jury.)

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I think, my Lords, interpreting this direction with reasonable latitude, we must take it to mean, that if the jurors found Fitzgerald's "proposal" to be false and material, they were to find for the defendant; but that, unless they found it to be both false and material, they were to find for the plaintiff. He considered it to be essential to the defendant's case that the statements should be material as well as false. That direction was affirmed in the Court from which this record now comes.

The important question at present is, whether the learned Judge was right in having directed the jury that, although the statements of the assured as to certain matters were false statements made to the Company, in and about effecting the insurance, the verdict

ANDERSON must be for the plaintiff, unless those statements were material as
 v. well as false.
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Although the learned Chief Justice BLACKBURNE came to a conclusion different from that at which the learned Judges now advising your Lordships have arrived, and in which I concur, and in which I am about to propose to your Lordships to concur, yet I think he very distinctly states (and the other learned Judges forming the majority concurred with him) the point on which the question turned. He says, "The plaintiff in error contends that it is sufficient to ascertain, simply in the terms of the policy, that the false statement was made in or about obtaining it; and that when this is done, the words of the condition are so comprehensive and stringent, that the question is solved and the policy avoided, whether the statement was material or *immaterial; in other words, that we are to read the clause as if it had contained those very words. I admit, if this be the meaning of the words,—if this be so clearly expressed as not to admit of any other rational construction,—we must give them the operation contended for. But is this so? It is obvious, that to maintain a defence founded upon this provision of the policy, proof must be made—first, of the false statement of some matter of fact; and secondly, that it occurred on the occasion of effecting the policy. The Judge and jury must inquire into both, and decide both." Up to this point I entirely concur with the learned Judge; he puts the case very distinctly and clearly. He then goes on thus: "What could answer this inquiry, or be said, with any propriety of language, to come within such terms, but a mis-statement used by the assured to induce the Company to contract, and how could it have done so if it had been utterly immaterial?" Now there, my Lords, I differ from the learned Judge. The Company stipulates this, that the assured shall contract with the Company that he warrants certain things to be correct, and further stipulates that if he should make to the Company any untrue statement in and about effecting the policy, such untrue statement shall avoid the policy; and then the Company says that it will not contract with him till he shall answer certain questions which are made the basis of the contract. Among those questions are these two: "Have any of your relations died of pulmonary complaints? Has an insurance on your life been accepted or refused at any other office?" The stipulation is, that if he shall not answer these questions accurately, the policy shall be void. That is the interpretation of the contract, which, taking

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together the policy and the particulars required to be subscribed, appears to me irresistible. The requirement is extremely reasonable. That we need not speculate on; but the reason for making such *a stipulation is obvious, and is explained by this very case. Whether certain statements are or are not material, where parties are entering into a contract of life assurance, is a matter upon which there must be a divided opinion. Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy.

Now it appears to me, my Lords, that that is precisely what has been done here. The parties entering into the insurance have so stipulated. "The basis of our contract shall be your answering truly these two questions." There were a great many others; but, putting those aside, they say the basis of the contract between us shall be that you shall answer truly those two questions, and if you do not answer them truly the policy shall be void. But then, when the trial comes as to whether the plaintiff has made out his right under that policy, the question is, whether the direction to the jury ought not to have been, "You are to ascertain whether what was then stated was untrue, was false; whatever interpretation may be given to the word 'false,' if it was false, there is no question as to whether it was material or not, the parties having stipulated that if it was false the policy shall be void." The question for the jury to decide was simply whether it was false or not. In that narrow compass the whole case lies.

The learned Judges who decided that the direction actually given was good, proceeded upon the well-known rule of law, that there is a great distinction between that *which amounts to what is called a warranty and that which is merely a representation inducing a party to enter into a contract. Thus, if a person effecting a policy of insurance says, "I warrant such and such things which are here stated," and that is part of the contract, then, whether they are material or not is quite unimportant,—the party must adhere to his warranty, whether material or immaterial. But if the party makes no warranty at all, but simply makes a certain statement, if that statement has been made *bonâ fide*, unless it is material, it does not signify whether it is false or not false. Indeed, whether made *bonâ*

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fide or not, if it is not material, the untruth is quite unimportant. If the man on entering into the policy had said that he arrived at Dublin three days previously, whereas he had only arrived that morning, and such statement did not form part of the contract, then, though false, it would be quite immaterial. If there is no fraud in a representation of that sort, it is perfectly clear that it cannot affect the contract; and even if material, but there is no fraud in it, and it forms no part of the contract, it cannot vitiate the right of the party to recover.

There are several cases, which are collected together in the 1st vol. of Douglas (1), in which this principle is well illustrated. But, my Lords, it appears to me that that principle has no application to a case where it is part of the contract, as it is here, that if a particular statement is untrue, then the contract shall be at an end. That distinction appears to me to have been overlooked by the learned Judges, and that oversight has been the ground of that which I must consider to be the erroneous conclusion at which they arrived.

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My Lords, it is within this narrow compass that the case lies. We had the advantage of the assistance of eleven of the learned Judges of this country. They all took the same view of the case, and they were all of opinion that the learned Judges in Ireland committed an error in supposing that the doctrine of representation, as distinguished from warranty, was applicable to the present case, where the representation is itself included in the contract. They thought that the conclusion at which the learned Judges in Ireland arrived was erroneous. My Lords, in that view of the case I entirely concur. I shall therefore think it my duty to move your Lordships that judgment be given for the plaintiff in error.

LORD BROUGHAM :

My Lords, I entirely agree with my noble and learned friend, that this case really lies in a very narrow compass. It depends entirely upon the construction which we are to put upon these words in the policy, "or any false statement made to them," the insurers, "in or about the obtaining or effecting of this insurance."

Now, first, there is the warranty. Then, previously to the clause in question, there are these words, "or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly

(1) *Bean v. Stupart*, Doug. 11, and the cases there collected in the notes; see also Doug. 284.

disclosed or communicated to the said Company, or if any fraud shall have been practised upon the said Company ;” and then comes this larger, and, as it were, more sweeping clause, “ or any false statement made to them ;” as if it were, “ or any false statement whatever made to them, in or about the obtaining or effecting of this insurance.” At first I had some doubt, as the learned Judges appear to have had, with respect to the word “ false,” whether it implies merely *untrue, or morally false,—untrue, but not within the knowledge of the party making it, or morally false, that is, untrue within his knowledge. At first, I certainly had an impression upon my mind that it was to be taken as implying morally false rather than merely untrue, and that impression was grounded upon what immediately precedes ; for “ true ” is used in a former part of the document, and “ fraud ” is used in the immediately preceding clause. I had, therefore, the impression at first that “ false ” there meant morally false, as contradistinguished from merely untrue. I have since come to the opinion which my noble and learned friend and the learned Judges advising the House have come to, that it does not mean morally false, but that it means simply untrue.

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But be that as it may, it is quite immaterial ; for whether we take the word as untrue absolutely, or untrue within the knowledge of the party making the statement, in either case, it appears to me, as it has done to the learned Judges, perfectly clear that the two questions to put to the jury were, “ Was there an untrue statement made, whether with the knowledge of the party making it that it was untrue, or not ? ” And, “ Was it made in or about the obtaining or effecting this insurance ? ” According to my opinion, agreeing entirely with that of my noble and learned friend and the learned Judges, those were the fit and proper questions, and the only questions to be put to the jury. And I think, further, that it is matter of exception, and made the direction of the learned Judge liable to exception, that he had directed the jury to consider the materiality of the statements in question. The truth of the statement, it being part of the contract, not its materiality, was in issue. I am therefore of opinion, with my noble and learned friend, that in this case we ought to give judgment for the plaintiff in error.

LORD ST. LEONARDS :

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My Lords, I believe that a more important case than the present has not come before your Lordships during this session. Because,

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although the point turns simply upon the proper construction of the instrument, yet it leads to such important consequences with regard to insurances for life, which are so common in this country, and upon which many persons entirely depend as their security for a provision for their families, that it becomes exceedingly important to consider maturely what is the true construction of an instrument of this sort. It is of course prepared by the Company, and if therefore there should be any ambiguity in it, must be taken, according to law, more strongly against the person who prepared it. At the same time your Lordships must take care to guard Companies of this nature against any fraud, and not to give validity to any part of the contract which has that object. That has been the practice for many years past. The courts of law, observing how often such Companies have been subjected to frauds, have advised them to protect themselves by a sufficient provision against the commission of fraud, and that has led to such stringent provisions as those which we find in this case, provisions which, I am bound to say, unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable portion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written.

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In some cases, and it is so in the present, the Companies take care to go beyond the law, and to protect themselves by a stipulation that a statement, which is not a warranty but a representation, if made contrary to the fact, shall *avoid the policy. At law, if that statement, though untrue, was not untrue to the knowledge of the party who made it, the assured is entitled to recover the sums which he has paid. So that, although provision for the family is not obtained, yet there is no actual damage done to the fortune of the man. He is disappointed in his object, but the money which he has accumulated and paid for the insurance is repaid to the family. This Company, however, has taken care that no such consequence shall ensue, but provides that, if any statement within the contract has not been truly made, the man's family shall not only lose the benefit of the policy, but shall not be able to recover a single shilling of the premiums paid, however numerous they may have been.

This, my Lords, is rather a singular case. This Company, like all others of the same kind, started, in dealing with the assured,

by tendering to him certain particulars which he was required to answer, and he was to sign a declaration at the end of them. Questions, twenty-seven in number, were asked, most of them being material. Of those twenty-seven questions, the Company, in framing the policy, chose to select fourteen, and to make every one of those fourteen the express subject of a warranty. The others were not included in the warranty. Amongst the questions which are omitted from the warranty, we find that those two very important questions upon which this case has ultimately turned have been omitted. I cannot imagine two more material questions. Supposing them to have been untruly answered, you would look naturally to the policy to see whether they were there; but the policy has excluded them. The policy takes this shape: it states as many of the questions as the Company has chosen to take out of the particulars, and it states them as so many warranties, and then it proceeds upon that warranty to grant *the policy. The policy begins in these terms: That the assured "hath warranted and doth warrant that his name," and so on, and then it goes through the several terms which the insurers have chosen out of those particulars to constitute what they call their warranty, after which there is the common form of assuring the money. Then comes this proviso, upon which the policy is granted, that in case he should do certain things, such as go abroad, or enter the army or the navy, the policy shall be void. That is all quite right. Then come these important words, making void the policy; "or if anything so warranted should not be true." There the attention of the assured is drawn at once to the warranty. He reads the terms of the warranty, and he is told that if anything he has warranted is not true, the policy is to be void. The word "true" there is used, of course, in a general sense, and whether the man knew it to be true or false is utterly immaterial. Whether the circumstances warranted were material, or not, is entirely out of the question. It is simply sufficient, and ought to be sufficient to avoid the policy, that any one thing warranted is not true; and therefore the word "untrue" there is used in its general sense of an untruth in the abstract. It signifies not whether he did or did not know it to be untrue, it signifies not whether the circumstances were material or immaterial, the contract is to be avoided.

Then follows this, I may say, remarkable clause. Your Lordships will observe, that whenever they begin a new limb of a sentence they begin it with a conjunction. The first is this,

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which I believe I have already read, "Or if anything so warranted should not be true." The next is, "Or if any circumstance material to the insurance should not have been truly stated, or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated *to the said Company." This is all one limb of the sentence, and is all governed by the same words, the first words, "or if any material circumstance." So that all the misrepresentation and all the misstatements which are there guarded against are with reference to some circumstance material to the insurance, "or if any circumstance material to that insurance should not have been," &c. Now, so far again, it is perfectly correct, only it would have been much better if they had inserted among those things which they meant to consider material, the questions they had asked, and which had been answered. It would have led to a better understanding of the contract, if they, as in my opinion they ought to have done, had inserted them. But still the second limb of this sentence is right enough. The first is, that if any portion of that warranty is untrue, the second, if any material circumstance has been untruly stated. If it is material, then its untruth will avoid the contract, although the party did not know it to be untrue. So far I entirely go along with the contract.

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Then follow those words upon which so much has turned, and which have led to so much difference of opinion. And I must say that that very difference of opinion between such very learned persons upon such an important case as this, of itself shows the improper manner in which this policy has been framed. A policy ought to be so framed, that he who runs can read. It ought to be framed with such deliberate care, that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the Company can be cheated, shall be found upon the face of it: nothing ought to be wanting in it, the absence of which may lead to such results. When you consider that such contracts as this are often entered into with men in humble conditions of life, who can but ill *understand them, it is clear that they ought not to be framed in a manner to perplex the judgment of the first Judges in the land, and to lead to such serious differences of opinion among them.

The words which have led to this great difference of opinion are these, "Or if," and here begins the last limb of the sentence, which is all governed by the first words "or if," "or if any fraud shall

have been practised upon the Company, or any false statement made to them in or about the obtaining or effecting of the insurance, this policy shall be void, and the premiums shall be forfeited." Now what does this mean? Nothing can be more simple than the meaning of the first words, "or if any fraud." The provisions before made against untrue statements and other material matters might not hit a great many cases of fraud; there might be personation for example. A great many descriptions of fraud may be in action; there might be many circumstances concurring to a fraud that could not be described, because fraud is a very general term, and it is impossible therefore to particularize before-hand what is meant by fraud. But you know very well what fraud is when it comes before you for judgment. Therefore, if there should be fraud, this policy very properly strikes at it. But the difficulty in which the Judges in Ireland involved themselves was this. They were endeavouring to import the word "material," which is found in the second branch of the sentence, into this third branch. Of course, you could not speak of anything so absurd as a "material fraud." "If any fraud" stands quite right, if any fraud has been committed, the policy is to be void. Then what is the meaning, in conjunction with those words, of that which follows. Surely, my Lords, these "false statements" must mean something which is connected with that which occurs *in the other branch of this limb of the sentence, namely, "fraud." The Company has provided against any untrue statement generally contained in the warranty, and generally, also, against any material misstatement. Then comes "fraud," and fraud may be committed in action without any actual misstatement, and therefore I connect with that "false statement." Now when I find that the contract uses, to express the same thing, two words which may indeed have the same meaning, but which are also open to different senses, I must be very well satisfied, before I apply the same construction to those two words, that such was the intention; for if a proper word is used, and then afterwards a word is used which admits of a different as well as of the same sense, I should come naturally to the conclusion, if there is nothing in the context to prevent it, that the intention was not to use the second word in the same sense in which the first word was used (or else why not repeat the first word), but to use it in a different sense. Now in what sense is the word "true" employed in the first part? "True" there is used in the general sense; it signifies not whether it is morally true

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or not. The question is, whether it is true. If it is not true, the consequences follow under this contract; but when I use the word "false" in a sense connected with fraud, what do I mean? I mean not only that which is untrue, but I mean that which is malicious, wilful, which is criminal, which is false in an odious sense, and to the man's knowledge. And therefore the construction which, after a great deal of consideration, I should put upon this part of the clause certainly is, that it refers to a wilful fraud, a wilful misstatement, and that the word "false" there is used in contradistinction to the word "untrue" in the former part of the sentence, and means a wilful misstatement; and then, connecting that with the *subsequent words, a wilful misstatement, as it should be read, "in or about the effecting of the insurance," I think all the mischief will be taken out of this policy, because I think there is no jury having such a case to consider, which would, where a mere impertinent question had been asked of a man and untruly answered, though it might be held to be in and about obtaining the insurance, come to the conclusion that that man had committed wilful falsehood upon such a subject when the statement had not and could not have any material bearing upon the insurance, for it must be a statement "in or about the insurance;" and if the untruth must be wilful, I think that any honest man would be safe, even under this contract, by such a construction.

The question then would be, was this a wilful falsehood in or about effecting the insurance? Supposing it had been some indifferent question which they chose to put to him, and which he had answered, but yet had not answered truly, if the jury felt satisfied that it was a mere impertinent, irrelevant question, the verdict would be in his favour. For, observe, if it is an impertinent or irrelevant question, how likely it is that the assured, the man who is bargaining for his policy, will have his prudence and his caution lulled asleep, and will not be so alive to the duty of answering truly as he would be, meaning to act honestly in regard to matters which he could not help feeling were essentially necessary to be answered in order to enable the Company to form a judgment upon the subject.

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I think that your Lordships, and every court of justice, should endeavour to give such a construction to a policy of this nature as will afford a fair security to the person with whom the policy is made, that, upon the ordinary construction of language, he is safe in the policy which he has accepted. I am quite sure if policies of this nature are *to be entered into, and such doubts are to be

raised as have been raised in this case, that that very important branch of insurance, life-insurance, will become very distasteful to people, and that no prudent man will effect a policy of insurance with any Company without having an attorney at his elbow to tell him what the true construction of the document is. And, indeed, in this case it has been necessary to consult all the Judges in Ireland, and they having decided in one way upon the language of this policy, the Judges of England have been consulted, and they have come to a different opinion.

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My Lords, notwithstanding that I have thought it my duty to draw your Lordships' attention to the true construction of this policy, I do not disagree with my noble and learned friend in the motion which he has made, because I think the question was not properly put to the jury as to the materiality of these statements. I think that, in reference to these two questions, for example, whether any of his relations had died of pulmonary complaints, and whether his life had been refused by any other Company, the learned Judge ought not to have told the jurors that their verdict ought to be for the plaintiff in error unless they were of opinion that the statements were both false and material. That was a wrong direction. But I think it very important to impress upon Companies that they ought not to issue policies in this shape, and I think that they would do well if they were to place the word "wilful" before the words "false statement" in that last branch of the clause. So, if it is their intention to exclude materiality, I think it would be but honest and fair so to state upon the face of their policy, that persons who are really not competent to form a judgment upon such a question may at once, upon the face of the policy, see what risks they run; *for, remember, that the proviso inflicts upon the family the loss not only of the sum assured, but of all the sums, possibly a great portion of the savings of a man's life, which have been paid for the policy itself.

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After all, everybody feels this difficulty. The Company is entitled, and is bound to guard itself against fraud, and the Courts have always shown the utmost anxiety to protect Companies against fraud, and always will do so. We are not entitled to look at the facts of this case, and therefore I am not using the facts for the purpose of the judgment which I am recommending your Lordships to give; but the facts of this case were very likely to mislead any one in his judgment. The jury went wrong in this case, and the proper application to the Court would have been to set aside the

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verdict, and not to have taken exceptions to the Judge's charge. Nothing could have been clearer than that the two questions were material. The jurymen were perverse, and went wrong in bringing in a verdict contrary to the evidence as to the materiality of the questions. What could have been more material than that question, "Has your life been refused by other offices?" It is utterly impossible that anything could have been more material; because if it had been answered truly, he would then have been asked, what offices? He must have stated what offices, and this Company would have had an opportunity of inquiring of those offices what were the grounds upon which they had refused him. It seems to have been, so far as we can judge from the evidence, a very proper case for the Company to resist. Therefore I am not finding fault with the conduct of the Company in this case, but I am drawing your Lordships' attention, which I thought it very material to do, to the terms of the policy. I think the Company was right enough in resisting this claim, but I cannot think the Company *to be right in so framing a policy. I entirely agree with the motion of my noble and learned friend as to what should be done in this case.

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Ordered and adjudged,

That the judgment given in the Court of Exchequer Chamber in Ireland, affirming the judgment given in the Court of Exchequer in Ireland, be, and the same is hereby reversed; and that the judgment given in the said Court of Exchequer in Ireland be, and the same is hereby also reversed; and that the verdict given by the jury in this case be, and the same is hereby vacated and annulled: And it is further ordered, that the said Court of Exchequer in Ireland do award a *Venire facias de novo*, and proceed according to law; and that the record be remitted to the said Court of Exchequer in Ireland.

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(4 H. L. C. 517—564.)

Where an estate for life is given by clear words, the mere imposition of a charge on the tenant for life will not have the effect of enlarging the estate.

A testator, by a will written on the pages of a small note-book, divided his property into three classes, marked No. 1, No. 2, No. 3. He devised these classes of property to persons designated by letters. The order of "succession" was marked in one page (54) of his will. This page contained the words "The eldest and other sons to inherit before the next

1853.
July 15, 18
19, 21.
—
Lord
CRANWORTH,
I.C.
Lord
BROUGHAM.
Lord St.
LEONARDS.
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letter." The persons designated by the letters were all named in a card, which was referred to in the will, and which card was with the will admitted to probate. K. was the testator's wife, to whom was given an estate for life in all the classes of the property. The will required implicit obedience to certain orders of the testator on the part of "the individual first to inherit after K.;" and if not, "the property aforesaid set down and particularised in No. 1 to go to M., if not to L., and afterwards to his eldest lawfully begotten son, &c." There were similar expressions with regard to N. and O. The card showed that these two letters were intended for the eldest sons of two nephews, but who were then unborn. The property No. 1 consisted of very large sums in stock, which the executors of the will were to invest in the purchase of real estate; and in page 54 L. was named as the person to take No. 1 after the life estate of K. A grandson was "to inherit before the next-named in the entail or any one of his sons." Class No. 2 consisted of a small estate in land, and by page 54, O. was, as to that, to succeed to K., and the estate there given to O. was expressly a life estate, with *remainder to his eldest and other sons in tail male; and it was there also said "a grandson legitimate shall inherit before a younger son." Class No. 3 consisted of certain estates in Suffolk; the "succession" there was (page 54) "first to K. then to M.," and the devise (page 47) was "first to K. and then to M., and afterwards to his eldest legitimate son, and then to his other legitimate sons in order of primogeniture, provided, but not else, the eldest have no issue male; if he have, it will go to him, and so on to the other sons in like manner. After the decease of K., I repeat, I bequeath all the property aforesaid to M. and his heirs male, in the manner aforesaid, as in the case of L., &c., at page 2, and I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions:"

Held that, reading all the parts of the will together, L. only took a life estate in No. 1, with remainder to his eldest and other sons in tail male:

Held, also, that this was not an executory trust.

The Court of Exchequer, on an information filed by the *Attorney-General* for legacy duty, had held that L. took an estate tail. On a bill to carry into effect the trusts of the will, the VICE-CHANCELLOR held that L. took a life estate only:

The VICE-CHANCELLOR's decision was affirmed; but as the testator had himself created the difficulty, the costs were ordered to come out of the estate.

Meaning of words "son," and "grandson," and "inherit."

THIS was an appeal against a decree of Vice-Chancellor TURNER, pronounced in July, 1851, in a suit instituted to obtain the decision of the Court on the construction of the will of Sir Gilbert East, who died on the 11th of December, 1828. The testator made his own will in the pages of *a parchment-covered book, and designated his intended devisees and legatees by letters. The explanation of the meaning of these letters was given on a card. The book and card were admitted to probate, as constituting the will of the deceased. In the course of the suit, it was determined that the persons thus designated in the will were duly ascertained by the card.

In the first page of the book, which was dated 10th January, 1819, the testator said, "I hold forth to the direst execrations and

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infamy any person endeavouring to alter or overset, by suffering a recovery, by any Act of Parliament, or in any other way, these directions herein set down; and further, that if the injunctions and directions in No. 1 (1) be not most fully and rigidly adhered to in every respect by the individual first to inherit (2) (2) after K., and therein set down, that then I order and bequeath the property aforesaid set down and particularised in No. 1 to go to M., if not to L., and afterwards to his eldest lawfully begotten son, &c., on the sole condition of their fully and unequivocally conforming to the conditions therein set down, but not otherwise; and if he or they shall not in every respect and tittle conform thereto, then and in that case I leave and bequeath the property aforesaid in No. 1 to N., and at his decease to his eldest legitimate son, &c., and in case he *or they shall not in like manner rigidly and fairly comply with these conditions in No. 1 set down, then I bequeath the said property to (8), and at his decease to his eldest legitimate son, &c. Now in case of his or their non-compliance in every respect to the conditions set down in No. 1, then the said property shall go to O., and at his decease to his eldest legitimate son, &c.; but still only if he and they do unconditionally comply with its orders and directions. In case of the decease of an eldest son in any of the above-named cases, or in any subsequently named, then the property in No. 1 shall go to the second legitimate son, and so on, according with primogeniture; but it is my will and order, that in every case a grandson shall inherit before the (4) next named in the entail, or any of his sons. If or his sons shall not comply with the terms here specified most particularly, the property set down in No. 1 shall go to P., and at his decease to his eldest legitimate son, &c. And again, in case of non-compliance in the last-named, or any one of his sons who may be entitled to inherit by the conditions of this will, I in that case bequeath the property set down in No. 1 to Q., and then to V. and his eldest son, &c., after his decease; and if neither he or they, or any one individual herein set down or designated, though unborn, shall fully bind himself or themselves to adhere to its conditions (5) unequivocally,

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(1) The testator, at p. 54, divided his property into three classes, and marked by letters the individuals who were to take any interest in each class. These letters were explained by the card, which expressly referred to p. 54.

(2) The figures printed in this report

in brackets designate the beginning of each page of the book. There were several blanks in the will, all of which are marked in the parts here quoted. The pages were very irregularly filled up.

then and in that case I hereby bequeath all the property set forth in No. 1 aforesaid, to increase the funds of my almshouse, &c.” (7). “At my decease I leave the appropriation of all dividends arising from,” naming the stocks, “to K. for his natural life, and afterwards I request R. and his heirs, &c., and S. and his heirs, &c.,” the executors, “to proceed directly to lay out in one or more freehold estates, all the above-recited stocks, in England, but *nowhere else. (10). “It is my will and direction that the succession of inheritance to all this property set forth in this No. 1, at the decease of each person, as it may happen, in possession, shall be in every respect and way the same as in the case of non-compliance with the conditions herein stated.” In (11) the testator required that every person taking the property bequeathed in No. 1 should take the name of Gilbert East, and the arms, motto, and crest of his family “under penalty of the whole of this property in No. 1 bequeathed going to the next to inherit as before set down.” In (13) he described the property No. 2, an estate at Fifield, which he bequeathed “to K. for life, and then to O. for life, and then to his eldest legitimate son, and afterwards to his other sons, if the eldest have no issue male; it being my will and intention in this, as well as in the cases set down in No. 1, that a grandson legitimate shall inherit before a younger son.” In (14) the testator provided that if O. should die “without issue male” Fifield was to go to N. “for his life, and then to his eldest son,” and in case of no male issue, “to M. for life only, and then precisely as before directed to his eldest, and other sons after the eldest,” and if no issue male, “to Q. and his eldest son,” and so to W. “for his life and his eldest son.” In (15) the testator declared that he disapproved of Fifield being sold “on any legal contingency occurring,” and no timber was to be cut “save only for necessary repairs, and ornamental timber not even for that purpose.” There were then annuities for the maintenance of his dogs and horses, and a favourite parrot, and legacies for servants, and in (23) he declared that “the person first entitled to receive my property set down and detailed in No. 1 at p. 7 of this book shall be my residuary legatee.” The pictures were to go “to the individual (25) actually in possession of the *property set down and bequeathed in No. 1 and to go as heirlooms, to be inherited by each one in succession as hereinbefore particularly described, as to succeed to the property bequeathed in No. 1.” In (33) was the following bequest: “I leave unto H, I leave unto Y, both nieces of Lady East, to each one 3,000*l.*; and also to each one

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200*l.* per year for their lives, to be paid by the person in possession of my property set down at No. 1 and p. 7 of this book, on my decease, independent of any coverture." In (34), dated Dec. 4, 1819, he said, "Whereas by the decease of my father, Sir W. East, Bart., which occurred on Oct. 12, 1819, and by my right to inherit all his freehold lands unbequeathed, the following lands belong to me and are in my power to dispose of: and I do hereby dispose of them as follows, to wit, that they do go to the persons successively described in No. 1 and at p. 7 of this will, and on the same terms and injunctions in every respect as have been heretofore particularly set down." In (35), dated 11th January, 1820, with the view of correcting an omission in the foregoing pages, he said, "any legitimate issue I may have shall inherit next after K. and before L. and all the rest, all my property set forth in Nos. 1 and 2, and at pages 7 and 13 of this will, as follows, I leave these properties aforesaid to my eldest son, and all other my sons, in order of primogeniture; provided my eldest son have no issue male; and hereby entail them in my family to the utmost extent the laws of England will admit: but in failure of issue male, I leave all the properties aforesaid bequeathed in Nos. 1 and 2, and in pages 7 and 13 of this book, containing my will, to my eldest daughter, and other daughters after her, in order of primogeniture, and to their heirs male." He then directed the purchase of the great tithes of Witham, in Essex, and in (42) said, when the *purchase shall have been made, "I hereby will and direct that they form part of the entail in every way and respect as the other property set down in No. 1 and at p. 7 of this book and of my will."

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The testator then proceeded to dispose of his Suffolk property, and certain houses, freehold and leasehold, in Middlesex, which (46, 47) he said, "I bequeath first to K., then to M., and afterwards to his eldest legitimate son, and then to his other legitimate sons, in order of primogeniture, provided, but not else, the eldest have no issue male; if he have, it will go to him, and so on to the other sons in like manner. After the decease of K., I repeat I bequeath all the property aforesaid to M. and his heirs male in the manner aforesaid; as in the case of L., &c., at p. 2; and I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions; and again, in failure of issue male legitimate, I bequeath (48) the property aforesaid to O. and his heirs male, and next to L., all under the same rules and injunctions in every respect." His house in London he bequeathed (50) to K., or

if she should die before him to M. or to N., “with this distinction that it be settled on their heirs male.”

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The 54th page was in the following form :

“Succession of property in this my will set down at No. 1 and [524]
p. 7 of this book :

“Marked * This corresponds with the card (1) :

“First to K.

“Then to

“Then to L.

“Then to M.

“Then to N.

“Then to O.

“Then to P.

“Then to Q.

“Then to V.”

The eldest and other
sons to inherit before
the next letter.

The “succession of property” relating to Fifield and to the Suffolk property, and Middlesex freehold and leasehold houses, was in each case marked in the same way.

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The testator died on the 11th December, 1828, without issue,

(1) The card was in the following form :

FRONT OF THE CARD.†

This is a Key & Index to the red letter initials entered in a Parchment covered Book 6 1/2 inches long and 4 inches wide & thus marked on the back Δ ; & containing my Will—Nota Bene the Pencil entries are as valid as the Ink—This corresponds with page 54 of y^r Will.

K ... signifies *Eleanor Mary East*

L ... signifies *Gilbert East Clayton*

M ... signifies *second son of William Rob^t Clayton*

N ... signifies *eldest son of Richard Rice Clayton*

O ... signifies *eldest son of Augustus Philip Clayton*

P ... signifies *eldest son of William Tonge*

Q ... signifies *William Capel Clayton*

R ... signifies *Samuel Twyford*

S ... signifies *Samuel Girdlestone*

T ... signifies

V ... signifies *Gilbert East Jolliffe*

W ... signifies *eldest son of John Lloyd Clayton*

X ... signifies

Y ... signifies

Signed by me GILBERT EAST January 30. 1828.

† For back of card see next page.

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leaving Mary, the wife of Sir W. Clayton, his only sister, and heiress-at-law. The appellant is the eldest son of her second son. Her first son succeeded to his father's baronetcy, and her second son took the name of East in addition to his own. In 1829, the testator's widow instituted a suit in the Court of Chancery to administer the estate. She died in 1838; the suit was revived, and under various orders a sum of 292,291*l.* was raised out of the funds standing to the account of the property No. 1, and invested *in the purchase of real estates, which were conveyed to the executors for the purpose of the trusts of the will.

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By an order of Lord Chancellor COTTENHAM, made on the 17th of December, 1841, it was declared that the appellant became, immediately upon the decease of the widow, entitled in possession for his own use and benefit to the rents and profits of the several estates which had been purchased with and out of the testator's property No. 1; but such declaration was not to be deemed or taken to prejudice the question whether he became so entitled as tenant in tail or tenant for life only.

The appellant attained twenty-one on the 12th of November, 1844, and by a disentailing deed, dated the following day, and duly enrolled, the estates so purchased as aforesaid were conveyed by the appellant to Charles Reynolds Williams, his heirs and assigns,

BACK OF THE CARD.

This is a Key & Index to Legacies &c. bequeathed by me in the Book, on the other side hereof particularly explained.

- Π .. signifies *Eleanor Julia Anne Raitt*
- Τ .. signifies *Henrietta Charlotte Raitt*
- ♣ .. signifies *Martha Hack*
- Δ .. signifies *Thomas Gibbons*
- Θ .. signifies *Richard Keeley*
- Ζ .. signifies *George Hammer Leicester*
- ∩ .. signifies *Sarah Story spinster*

Signed by me GILBERT EAST January 30. 1828.

freed from all estates tail of the appellant in the same, and all estates, rights, titles, interests and powers to take effect after the determination or in defeasance of the same estates tail, to the use of the appellant, his heirs and assigns, for ever.

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. By an order of the 18th of March, 1845, the appellant was let into possession of the estates so purchased aforesaid, and certain heirlooms were directed to be delivered to him.

In 1849, the *Attorney-General* instituted a suit against the executors for the recovery of the legacy-duty payable in respect of the property, No. 1, and the Court of Exchequer in that suit declared that the appellant took an estate in tail male in the estates purchased therewith, and that the duty was payable on that footing; it was paid accordingly. No duty would have been payable if the appellant had taken an estate for life.

In May, 1850, the appellant filed a supplemental bill in the Court of Chancery against the executors and others *(one of whom was his son Gilbert Aug. G. East, who was born on the 25th of April, 1846), which set forth the former proceedings, and prayed that the appellant might be decreed to be entitled, as against the said defendants thereto, to the benefit of the said suits and proceedings, and the several decrees and orders therein; and that it might be declared that, according to the true construction of the will of the testator, the appellant became and was entitled to an estate in tail male, in possession, in the estates purchased with or out of the said testator's property, No. 1; and that it might be declared that he was absolutely entitled to the goods, chattels and heirlooms, delivered to him under the said order of the 18th of March, 1845; and that the executors might be directed to convey such purchased estates to the appellant in fee simple, as entitled thereto, in equity; under the said disentailing assurance of the 13th of November, 1844, and for general relief.

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The cause was heard before Vice-Chancellor Sir G. J. Turner, on the 11th of June, 1851, and two following days; and judgment was given on the 5th of November, 1851, when the Court, being of opinion that the appellant was only tenant for life of the estates, the bill was dismissed. The present appeal was brought against that decree.

Mr. Rolt and Mr. Bates, for the appellant:

The estate to which the appellant is entitled is an estate tail. The use of the word "succession" affords a strong argument to that

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effect. [They cited *Robinson v. Robinson* (1); *Montgomery v. Montgomery* (2); *Crozier v. Crozier* (3); *Lewis v. Puxley* (4); *Mellish v. Mellish* (5); *Wight v. Leigh* (6), and other cases.]

[530] The testator's intention is again shown by the provision for the payments of the 3,000*l.* and of the annuities of the 200*l.* to be made to the two ladies mentioned in page 83. He could not have charged such large payments, and especially annuities, on the estate of a mere tenant for life, and *this charge, therefore, points strongly to the conclusion that the person who was intended to bear it was to have an estate of a much more permanent and beneficial character. * * *

[531] In the Court below, the VICE-CHANCELLOR sought to get rid of the difficulty of construing the word "son" as a word of purchase, and the word "grandson" as a word of limitation, by saying that "that argument rested on a technical basis, and that this will must not be looked at with a technical eye," and then he went on to say that the testator had himself shown that he knew how to limit a life estate. That is the argument on which the appellant relies, contending that the testator's intention here is sufficiently marked, and that there can be no doubt of that intention being to create a tenancy in tail. *Vanderplank v. King* (7) is not directly applicable here, and its authority must now be considered as impeached by that of *Monypenny v. Dering* (8).

Mr. Malins and *Mr. Kent*, for the respondent :

[533] * * The appellant is tenant for life only, with remainder to his first and other sons in tail male. On the failure of any one of the sons the next person is to succeed, or, as the testator says, to "inherit." That word means to "take," nothing more. * *

[534] The words "eldest son" cannot, without great aid from the context, be made words of limitation : *Doe d. Burrin v. Charlton* (9). * * *

[535] In *Mellish v. Mellish* (10), the COURT read "son" and "daughter" as importing the whole line of issue; but that was expressly because the circumstances showed that, if not so read, the estate would go out of the family, and the real and undoubted intention of the

(1) 3 Atk. 736; affirmed by the House of Lords, as reported under the title of *Robinson v. Hicks*, in 3 Br. P. C. 100.

(2) 72 R. R. 17 (3 Jo. & Lat. 47).

(3) 61 R. R. 77 (3 Dr. & War. 373).

(4) 73 R. R. 701 (16 M. & W. 733).

(5) 26 R. R. 436 (2 B. & C. 520).

(6) 10 R. R. 120 (15 Ves. 564).

(7) 64 R. R. 186 (3 Hare, 1).

(8) 73 R. R. 547 (16 M. & W. 418,

434).

(9) 56 R. R. 424 (1 Man. & G. 429).

(10) 26 R. R. 436 (2 B. & C. 520).

testator would be defeated. The decision in *Wight v. Leigh* (1) proceeded on the same principle. But in *Doe d. Gallini v. Gallini* (2), the words were too powerful even for a general expression of intention to affect them, and the will being in terms very like the present, the first takers were held entitled only to a life estate.

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[They further contended that this was an executory trust, and the Court would therefore carry it into execution so as best to effectuate the intention, but according to the settled rules of equity.]

Mr. Rolt, in reply. * * *

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THE LORD CHANCELLOR :

[540]

My Lords, this case comes before your Lordships upon appeal from the decree of Lord Justice TURNER, when Vice-Chancellor; and the result of that decree was to declare that the claimant, Gilbert East, the party designated in the will by the letter *L.*, was only tenant for life of the property derived under the will of the testator, with remainder to his first and other sons in tail male. There had previously been a judgment of the Court of Exchequer, declaring that he was tenant in tail, the question having arisen in that Court upon an information filed by the *Attorney-General* against the trustees of the will, claiming legacy-duty, upon the ground that the present appellant was tenant in tail of the estates. The Court of Exchequer adopted the conclusion that the *Attorney-General* *was right, that Gilbert East Clayton was tenant in tail, and consequently that the Crown was entitled to legacy-duty to a very large amount.

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That was in some sort *res inter alios*. The same question was raised as that which is now before your Lordships; but it was not a direct proceeding between the parties, to have their rights established. A suit was instituted in the Court of Chancery to administer the property of the testator, and in that suit the VICE-CHANCELLOR made the declaration which is now the subject of appeal.

My Lords, having been a party to the judgment in the Court of Exchequer, and having there given what I considered a full and anxious attention to the case, I am in a somewhat difficult position,

(1) 10 R. R. 120 (15 Ves. 564).

(2) 39 R. R. 580 (5 B. & Ad. 621);
affirmed on error, 3 Ad. & El. 340).

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because in truth the appeal is brought to obtain your Lordships' decision between the conflicting judgments of the two Courts. I have always felt that when a Judge has to say whether a former judgment of his own was right or wrong, he is placed, if he wishes to be candid, in a double difficulty. On the one hand, there is inseparable from the human mind a natural bias or leaning to the belief that you were originally right; and on the other hand, there may be a danger that, from the fear of doing injustice by too rigidly adhering to an opinion formerly expressed, you may not do sufficient justice to that opinion; in other words, that you may do wrong from a fear of appearing to do wrong.

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I have endeavoured to divest my mind of all bias either on the one side or the other, and to look at the case simply as if it had now come before me for the first time; and having done so, I am bound to say that I think the VICE-CHANCELLOR was right, and that the Court of Exchequer, of which I had at that time the honour of being a member, came to an erroneous conclusion. In the Court of Exchequer the case was necessarily not argued by those *who had the real interests of all the parties to bring before the Court; but I do not allege that as any justification, if justification is wanting, for what I now consider to be the erroneous judgment of that Court. The case was, as far as I can recollect, most fully and elaborately argued, and we probably came to an erroneous conclusion from not adverting to that to which I will now call your Lordships' attention.

The case having been so recently argued here, it would be mere pedantry to go over the will again. Your Lordships are all perfectly familiar with its strange details. The testator, for some inexplicable reason, not choosing to designate his legatees and devisees by name, designates them all by some symbol; and then by a card, which forms part of his will, states what each symbol is meant to indicate. L. means the present appellant, and M., N., O., P., and Q., other members of the family. The way in which he makes his will is first of all by directing what is to become of the property in case any one of the parties inheriting that which he calls No. 1, which is the great bulk of his property, namely, personal estate amounting to 200,000*l.*, intended to be invested in the purchase of real estate, shall not comply with the injunctions which he is about to impose. Then at the bottom of the first page he says: "See the line of succession to No. 1, page 7, at page 54, corresponding with the card." Now, looking at page 54, you see this: "Succession of

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property in this my will, set down at No. 1 and page 7 of this book, marked," and then he gives the marks: "First, to K." K. means his wife, afterwards his widow. "Then to ——" We collect from other parts of the will that he there intended to introduce another person, who subsequently died in his lifetime, and who is therefore quite out of the question. "Then to L., then to M., then to N., then to O., *then to P., then to Q.;" and then he marks in the margin: "The eldest and other sons to inherit before the next letter." Now, conveying these words into each of the limitations, it will run thus: first to K. (for reasons I need not state, it is perfectly obvious that K. was to take an estate for life only—there is no question about that), then to L. and his eldest and other sons. Taking the words from the margin of the card, and placing them after L., for what is placed in the margin is stated to be applicable to each of the letters, then L. and his eldest and other sons take, and then M. and his eldest and other sons; then the estate goes to N., and so on through the rest of the letters. Suppose the matter stood there, what estate would L. take then? I apprehend there is not the least doubt that L. would take an estate in tail male, because of the words "eldest and other sons." Are they words of limitation or of purchase? They cannot be words of purchase, because then these devisees would only take life-estates, and that is obviously not the intention. The different parties are to "inherit," whatever meaning may be attributed to that word. It is quite clear, then, in what sense the testator contemplated the estate was to go on in order of succession,—“then to L. and his eldest and other sons.” I think that “sons” there is a word of limitation and not of purchase, that would be to L. and his eldest and other sons; that is, to L. and the heirs male of his body, and so on to the others, M., N., O., P., and Q. If it had stopped there, I should have had no doubt that L. was tenant in tail male. I think that view is not only not contradicted, but is confirmed, by what is found in the earlier portions of the will, with reference to default in the performance of the conditions in this passage, for it goes on in this way: “And further, if the injunctions and directions in No. 1 be not most fully and rigidly adhered to in *every respect by the individual first to inherit after K., and therein set down, that then I order and bequeath the property aforesaid set down and particularized in No. 1 to go to M., if not to L., and afterwards to his eldest lawfully begotten son;” and so on. The meaning of that is obvious. It is to go first to L., and to his eldest lawfully begotten son, &c., and if he does not comply with the

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conditions, then to M. That has been interpreted to be the meaning, and that is what it must have meant. Therefore the card having given to L. an estate, to him and his eldest and other sons, which is interpreted to have been an estate to him as tenant in tail male, how is that explained or opposed by what is found in this page 2? He says here it is to go "to M., and afterwards to his eldest lawfully begotten son, &c., on the sole condition of their fully and unequivocally conforming to the conditions therein set down, but not otherwise." I think that is nothing but a similar expression to that which is found on the card, "eldest lawfully begotten son," &c. "Son" must there mean heirs male, or otherwise it would only go to the party for life, and afterwards to his son for life. Then if he or they shall not conform to the injunctions and directions in No. 1, it is to go over to the next letter, and then to N., and on his decease, to his eldest legitimate son; and in case he or they should not rigidly comply with the conditions, then it is to go over. Then, my Lords, comes this passage, which is relied on by both parties as helping their construction of the case: "But it is my will and order, that in every case a grandson shall inherit before the next-named in the entail, or any of his sons." Now I must confess, that that phrase, to my mind, so far from showing that "son," in the former passage, was a word of purchase and not of limitation, aids the construction that "son" in the former passage, "eldest legitimate son," &c., was to be read as a *word of limitation. I conceive the intention of that is only to make his meaning more clear: he meant to say, though I have said "son," I mean that it is to go to the son, the grandson, and the great-grandson; that he intended it to go on in the course of male succession before another line is to succeed. It seems to me that this is merely an explanation of what he meant by the word "son." He meant to indicate that though he used the word "son," he considered that word to include in it grandson, and by implication great-grandsons, and so on; so that in my opinion, the construction to be put upon it by the card, construed by what is to be found in the card only, is not only not opposed, but is confirmed by what is found in pages 2 and 3 of the will.

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My Lords, that this is a legitimate construction is established by so many authorities, that it would seem to me to be mere pedantry to cite them or to refer to them. They are perfectly well-known authorities. One of them seems to me to illustrate the argument as well as a hundred. That one was a case before Sir William

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Grant, of *Wight v. Leigh* (1), in which very nearly the same expression occurs. There an estate was given to a person, and after his death to his son, and in default of such issue, over. Sir WILLIAM GRANT said, It is quite clear that the estate was to go over on the default of somebody's issue. Was it in default of the son's issue, or was it in default of the father's issue? He said that it must be in default of the father's issue, because otherwise you must read "son" as a word of purchase. If "son" is a word of limitation, it gives the estate in tail male. If you do not so read it, it becomes merely a word of purchase, and then there would be no words of limitation at all *attaching to the estate of the son. It appears to me, therefore, my Lords, that if the matter had rested on the card and on those three pages to which I have referred, 1, 2, and 3, still the Court of Exchequer would have come to the right conclusion, that this was an estate in tail male.

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It was suggested that the limitation at page 13, in reference to what is called the Fifield property, tends to throw light on the matter, and to show that no estate less than an estate tail was contemplated; because there the testator, disposing of a very small property which he had,—forty-nine acres of land, at Fifield in the parish of Bray, in the county of Berks, does tie that up in strict settlement; and it is said to be incredible that he could have meant to tie up in strict settlement that small property of forty-nine acres of land, and not have contemplated the same thing with respect to the great bulk of his property, which was to be purchased with money amounting to above 200,000*l.* My Lords, to that I can only answer, that I do not know what he meant. In a will of this sort, we can only see what he has said; and it does not appear to me, because he has entailed something strictly, that is, has given a life-estate, with remainder to the first and other sons, in a small property, that you can necessarily infer he did not mean to deal differently with the larger property. The argument drawn from the Fifield estate, therefore, seems to me to throw no light on the subject.

Then, my Lords, we come to that matter which, I confess, has altered my view of the case; that is, the disposition which the testator afterwards makes of what he calls his Suffolk property. In that case there is no doubt that he ties up the property by giving a life-interest to the first taker, with remainder to the first and other sons in tail male. He says, at page 47, "First to K.," that is, his

(1) 10 R. R. 120 (15 Ves. 564).

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widow; then to M., and afterwards to his eldest legitimate *son; and then to his other legitimate sons, in order of primogeniture, provided, but not else, the eldest have no issue male." Nothing could be more clear, therefore, than that, as to this property, M. was to take for life, and afterwards his first and other sons in order of primogeniture; but that his second son was only to take if the eldest had no issue male. That can scarcely be called an inartificial way of giving the estate: it is a very proper way of giving it; he could scarcely have done it in any better way; "if he have, it will go to him, and so on to the other sons in like manner. After the decease of K., I repeat, I bequeath all the property aforesaid to M. and his heirs male, in the manner aforesaid." Now it was said that that shows that what he meant in the former part of the sentence was an estate in tail male, because here he says he gives it to "M. and his heirs male." Now I think it is impossible to put that construction on the words. He says there he gives "all the property aforesaid to M. and his heirs male, in the manner aforesaid;" that is to say, I give it to him whom I call M. and his heirs male; which in one sense is correct enough, that is to say, I give it to him for his life, "and afterwards to his first and other sons, and their male issue in succession, in order of primogeniture." Then he says, "as in the case of L., &c., at page 2;" from which I can certainly come to no other conclusion than this, that he meant to say, "That is, what I understand I have already done with respect to L. at page 2."

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Then, my Lords, couple this with what is found stated so very strongly in one of the passages of the will, at page 35, that it was his object strictly to tie up the property: "And I hereby entail them in my family to the utmost extent the laws of England will admit;" he was saying that with reference to the possibility of his having *issue of his own. Still we may legitimately infer from it his wish to tie up all the property as long as the laws of England would admit. Now, although I say that the expression on the card and the expression at pages 1, 2, and 3 of the will would, I think, if they stood alone, have constituted an estate tail, and not an estate for life, with remainder to first and other sons in tail male, yet they certainly were not necessarily so to be construed. When a testator tells you he understood them to have a different meaning, they are not so impressed with the character of an estate in tail male that that explanation will not aid you to give a construction to what is otherwise obscure. My Lords, I think the limitations he has made

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in page 47, as to the Suffolk estate, show that to be clearly an estate for life, with remainder to first and other sons in tail male, and are by reference carried back to the estate in No. 1, which is the great estate in question. I am therefore of opinion, that the Vice-Chancellor was right, and that Gilbert East took only an estate for life, and not, according to the judgment of the Court of Exchequer, an estate in tail male.

One word, my Lords, about a matter that was adverted to by *Mr. Rolt* in his argument; I mean the gift of two portions of 3,000*l.* From that he inferred it must have been the intention of the testator to give an estate of inheritance, and not an estate for life. I am not aware of any authority for holding that a charge, where it is given clearly as a charge on the personalty, and not on the estates, has ever been held to constitute an estate tail. Where an estate is given generally by a person who is in possession of the property, as where an estate is given to A. B. without saying what estate he is to have, and afterwards a gross sum of money is charged upon A. B., and he is therefore put under the obligation of paying a gross sum of money, the Courts have said the testator must have *meant to give an estate in fee simple; but here, where the question on the face of the will is, whether the party took an estate for life or an estate in tail in the contemplation of this testator, neither in the one case nor the other could the devisee raise the 6,000*l.* upon the estate, because the testator imposes dire anathemas upon the party who should ever think of selling or disposing of it in any way whatever. It is not necessary, my Lords, to say what is the construction of the will as to those two sums; but I do not think that the grant of them turns an estate which, on the other parts of the will appears clearly to be an estate for life, into any greater estate. Probably the construction is such, although it is awkwardly worded, as to make those two sums chargeable on the inheritance; but it appears to me clear that they do not convert an estate for life into an estate in tail; and under these circumstances I think it my duty to move your Lordships that the judgment below be affirmed.

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LORD BROUGHAM:

My Lords, I take the same view of the subject with my noble and learned friend; but labouring as I now do under very considerable indisposition, I am prevented from stating, except very briefly, the grounds of my opinion. But first I wish to say how entirely I approve of the course taken by my noble and learned friend; a

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course which Judges ought in all cases to pursue where they find there has been a miscarriage in a judgment pronounced by them. The greatest evils have arisen to the administration of justice, nay, to the law itself, which has thereby been rendered both obscure and discredited, by the slowness Judges have shown in many instances to admit at once, as they ought to have done, whenever they have felt it, that a decision of theirs has been erroneous. Attempts have often, too often indeed, been made to distinguish one case from *another, to discover an altered state of the facts which would justify the Court, in the second case, in not applying the judgment given in the first without however subverting that judgment; and it has also thence resulted, that we know of one or two cases in the law, as to which it is said that the case of *Nokes v. Styles*, in such and such a report, will decide every other case in which the plaintiff's name is Nokes and the defendant's name is Styles, and the subject-matter is the same. It is a far better thing, my Lords, to say, as has been said, most fairly, and candidly, and wisely in this case, that the Judges of the Court of Exchequer, though having it argued before them fully, as my noble and learned friend says it was, omitted a material consideration in coming to the conclusion at which they arrived.

My Lords, I entirely agree with my noble and learned friend, that if we confine our attention to the completing part, if I may so call it, of the will to be found in page 54, an estate tail is given, and not an estate for life. The words there taken together are to be taken as words of limitation, not of purchase. I also agree with my noble and learned friend, that you may easily reconcile that conclusion with pages 1, 2, and 3, and to a certain degree with page 7 in the preceding parts of the will. The only point on which I incline to differ with my noble and learned friend is upon his remarks respecting grandsons. The case of a grandson inheriting before a son, in page 3 of the will, and also in page 13, where the Fifield meadows are dealt with, and where there is the same reference to grandsons taking before sons, seems to me quite immaterial; but I am rather inclined to think that those two portions of the will tend more to support the reasoning which sustains the words as words of purchase and not of limitation, and consequently that the estate given is an estate for life, and not an estate in tail.

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But be that as it may, we now come to that which really does overrule the construction put on the will by the Court of Exchequer,

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and supports the construction put on it by the VICE-CHANCELLOR, and makes that which else would have been an estate in tail male to be taken as an estate for life. It is perfectly clear, and requires no authority to show it, that you may refer from one portion of the same devise to another in order to explain what the testator meant in that other portion of it, even when the rules of law, as to construction, are the best established and the most cogent. This has been done, and is done every day. I need only refer to what was said by the COURT in *Goodtitle v. Herring* (1), in which a question arose as to the words most appropriate, as words of limitation, to give an estate tail, namely, "heirs of the body," when the Court, dealing with the question upon the ruling in *Shelley's* case (2), in *Colson v. Colson* (3), and other similar cases, Mr. Justice LE BLANC (4) said, "There is no rule of law to prevent the words 'heirs male of the body' from being taken as words of purchase and not of limitation, if they are clearly so intended to be;" and Lord KENYON, in that case, says the rule in *Shelley's* case is oftentimes not a good rule of construction; nevertheless it governs and must govern. He adds, however, it never has been decided that the testator might not otherwise explain what he meant by heirs of his body so as to make the estate taken not an estate tail, but an estate for life, converting those words into words of purchase. The testator, in short, if he chooses, may be his own commentator and conveyancer. He may be so, as I think he has been in this case. The testator may tell us what he meant by these words, and may thus give them a sense different from that which the law, without such an explanation *and interpretation, would impose upon them. Now the power, or rather the duty, we have of looking to what the testator explains as to the meaning of his words, is not confined to that particular portion of the will in which the words in question occur. You may quite clearly refer from one part of the will to another, from one gift to one person to another gift to a different person, to gather his meaning. Then, my Lords, we go to the gift of the Suffolk property in pages 46, 47, and 48, and it appears to me that there, by distinct reference from that gift to numbers 1, 2, and 8, the testator has told us what he meant, and that we are bound therefore to hold the latter to be an estate for life, and not an estate tail.

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My Lords, having once obtained the meaning, and having therefore

(1) 6 R. R. 270 (1 East, 264).

(2) 1 Co. Rep. 104 b.

(3) 2 Atk. 246.

(4) 1 East, 276.

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got at what the gift is meant to be, and having found that these are words of purchase, and not of limitation, and that that is the meaning, namely, as giving an estate for life, which we are to impose upon those words, I take it to be clear that we are then to have regard to the words in question when so explained, and that we are to read the devise as if the terms which are so explained were themselves used in the particular devise which we have to construe.

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Let us now consider the argument raised by *Mr. Rolt* with relation to the gift of the 3,000*l.* to each of the two nieces. The words of that gift raise the question whether the life estate, otherwise clearly created, is not to be enlarged into a greater estate. Now I looked into the cases immediately after the argument, to see whether I could find any case, for I was not aware of any, in which this mode of construction has ever been applied to enlarge an estate for life into an estate tail, and I did not find any one case of the kind. There are cases enlarging an estate for life into a fee, under circumstances where a charge has *been created which could only be satisfied by such means ; but there is an obvious reason for that in the very necessity of the case. The authorities differ even as to the ground of that. Sometimes they seem to think it is because the testator is not to be supposed to have intended to give a *damnosa hereditas* ; but other authorities, and better ones, in my humble judgment, put it on a different ground, namely, that he is imposing a burthen on the party taking the life-estate, which would be inconsistent with that party taking a lesser estate than an estate in fee simple, and therefore they hold that he meant to give an estate in fee simple ; so that where there had been a doubt before, where it was not clearly expressed that he had given an estate for life, they hold that he must be taken to have meant to give an estate in fee by imposing upon the taker of the estate a burden which would be inconsistent with his taking a less estate. But, my Lords, I take that rule to be always subject to this, that if there has been an express estate for life given before that, that estate so expressly given for life, cannot be afterwards enlarged into a fee by the mere imposition of a charge upon the taker of that estate. Now is there any difference in principle between that case and the present ? I apprehend not, because, as I have already said, if by taking the gift in page 54, together with the gift of the Suffolk estate in page 47, you come to the conclusion that there is no doubt, that there is no ambiguity, but that it is perfectly clear that an

estate for life only is given, and not an estate tail; it is just as much to be taken as an express estate for life, as if it had been given in the most apt and fit terms. Therefore, I apprehend, according to the authority of those cases respecting gifts and burthens imposed on the taker of a life estate, the case of *Denn v. Slater* ⁽¹⁾, *and other cases of that description, it is perfectly clear that if you have got, either by construction or by plain intendment of terms, an estate for life, then, having that estate for life once given, and there being no ambiguity in the gift, the imposing of a burthen on the estate will not convert it into a larger estate. Here it was argued that it would, in fact, convert it into an estate tail. I take it that there is no authority whatever for that, and no one instance to be found of an express estate for life being converted into an estate tail by merely imposing a burthen on the possession of it. I will not say what might have been the effect in this case if there had been any doubt, after comparing together the different parts of the will; because that is not the case here. If we are right, that there is no ambiguity, that there is an estate for life given clearly, though not by the description of the order of succession in page 54, or in pages 1 and 2; yet most clearly by taking them after reference to the Suffolk estate in page 47, in which the testator has as distinctly told us what he meant in pages 54 and 1, 2, and 3, as if it had there been in so many words expressed; then there is no warranty for our declaring this life estate, thus clearly given, to be enlarged by the mere imposition of a burden on the holder of it. Upon the whole, therefore, I have no doubt whatever, that in this case the Vice-Chancellor has come to a right conclusion, and that the judgment of the Court below ought to be affirmed.

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LORD ST. LEONARDS:

My Lords, I entirely concur in the opinions which have been already delivered to your Lordships, and although some little doubt might have been entertained with regard to the first parts of this will, if they had been considered alone, yet taking all the parts of it together, I think *no reasonable doubt can be entertained as to the legal conclusion. There are certain points raised which I will just glance at, in order to remove them out of the way in considering the true construction of the will. It is first said, that this was an executory trust, and that therefore we must mould it according to what we gather of the intention of the testator, expressed in the

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(1) 2 R. R. 616 (5 T. R. 535).

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limitations which are found on the face of this singular will. But I am clearly of opinion that this is not the case of an executory trust, but that we are bound upon this will to give the best construction we can to the limitations, and that we are not at liberty to mould and direct those limitations to carry into effect what we may suppose to be the intentions of the testator, as we might be required to do in the case of what is properly an executory trust. I therefore dismiss that point entirely from consideration.

It is then said, that the matter which my noble and learned friend has last referred to, namely, the portions of 3,000*l.* to each of two persons, would create an estate tail. I think the learned counsel hardly ventured to put it so far as that, he rather argued upon those gifts as being unlikely to be connected with an estate for life. I do not enter into the discussion of that question for this simple reason, that the person who first becomes possessed is to pay the 6,000*l.*; but that same person is also to be residuary legatee, and therefore the testator has furnished him with very ample funds to meet the charge thus thrown upon him.

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The great question raised in this case was as to the gift to an unborn son of a person *in esse*, with remainder to the children of that unborn son as purchasers. This we all know would not be good in law, and the question was, whether it could be executed by an application of the *cypres* doctrine. Upon that doctrine I *was rather startled to hear the learned counsel quote the case of *Hopkins v. Hopkins* (1). No doubt Mr. Butler, in his edition of *Fearne* (2), says "it seems to have been assumed that the second son of John Hopkins took an estate tail;" but I can find no trace of any such thing. On the contrary, the decision, so far as it went, was confined to an estate for life, and the former point never was raised in any portion of that case.

The Courts have, in recent times, got over the difficulty of these void limitations to unborn issue of a person who is himself unborn, and is the supposed parent of unborn issue, by the application of the doctrine of *cypres*, that is, if you attempt to give effect to the limitations as they stand, the law will declare them void to a certain extent, but will also carry the intention of the testator into effect to a certain extent. An unborn son will no doubt take for life; but on that limitation you cannot superadd limitations to the issue of that unborn son as purchasers. The law, therefore, steps in

(1) *Cas. temp. Talb.* 44; 1 *Atk.* 581; (2) 9th ed. 206, *n.*
2 *J. & W.* 18, *n.*

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benignly, and desiring to effect the general intention, not at the expense of the particular intent (because the particular intent never can be carried into effect), the law does step in on the doctrine of *cypres*, and says that the parent himself shall take an estate tail, which will comprise in it the issue which the testator intended to provide for. That doctrine is not to be carried any further; it is carried as far in the case of *Vanderplank v. King* (1) as it ever was carried before, if not indeed further; because there, upon a joint gift to several, that gift was severed, and the unborn son and his issue were held to take differently from the rest of the class. Upon that case I do not now give any opinion, it goes much further than anything which would be necessary in this case. Generally *speaking, as in the case of *Leake v. Robinson* (2), before Sir William Grant, when a gift is to a class, and that gift includes persons who are without the line of limitation; that is, if it is put on the ground of perpetuity, you cannot remodel that, because all the persons are intended to take as a class, answering the description, at a particular period, and the same rule must be applied to all the members of the class as to the class itself. I wish to give no opinion beyond that which is necessary to the case now before your Lordships. I therefore leave that case with this observation, that it is perfectly clear in this case that you are at liberty to give an estate in tail male to the unborn sons, represented by the letters N. and O.; and then the question is whether, if you do so, that breaks in upon your power to give effect to the rest of the limitations, at least those that precede it, according to the intention of the testator. I apprehend that it does not; because here are successive limitations; and if, in order to save this particular limitation, you give to them not a construction repugnant; you do not say that the testator did not give to the unborn son for life, with remainder to his first and other unborn sons as purchasers, you do not say that there is nothing inconsistent in the will, you do not say there was one gift in one way and another gift in another way; but you do say that in that particular case, because the gift cannot have effect given to it by law in the way the testator intended, you will give to it a different operation, so that it still shall have effect. I wish, therefore, just to press upon your Lordships this distinction, that in coming to that conclusion you do not put on the same words different meanings, because you hold that the testator in every case meant to make the parent tenant for life, with remainder

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(1) 64 R. R. 186 (3 Hare, 1).

(2) 16 R. R. 168 (2 Mer. 363).

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to *his first and other sons, born or unborn, as purchasers ; but in the particular case of the unborn son you do, in favour of the general intention, give a construction which you do not give to those limitations that require no such aid.

Having cleared away these points, I will shortly call your attention to the view I take of this will, which does not differ from that already stated to your Lordships. I think, as you go through all these limitations, step by step, that at every step you get more clearly at the intention of the testator, till at last all the evidence accumulates so that you cannot entertain any doubt.

In page 1 there is a note referring to the card. I take it for granted that the object of this card, and of this singular mode of drawing his will, was that he was afraid the copy of the will might fall into somebody's hands in his lifetime, and therefore he referred in it to a card, which card I suppose he took care to place where persons could not get at it, and if they did they would not know what the conditions of the will were; but would require to see both together in order to understand them. In the note in page 1 you will find the reference to page 54, the card containing the line in succession. Now when we look at that card we see that, after enumerating the persons, or the symbols rather, he says what has been already read, "The eldest and other sons to inherit before the next letter." Nothing can be more simple or more clear. The word "inherit" he uses almost throughout, and the word "entail" he also frequently uses; and it is quite clear that by "inherit" he meant simply a taking under the will, without reference to whether the person was to take as a purchaser or by descent from one of the devisees. He understood very well in general terms what an entail meant; he knew it meant to go from son to grandson, and although he did not *express himself accurately, which he thought he could do (and it is his conceit which has brought about this dispute, and unfortunately thrown a doubt upon the intentions he expressed), nevertheless he uses the words in a sense which he no doubt very well understood, namely, in their general sense. Now, in the limitation of the first estate, on which I do not consider it necessary to give any positive opinion, he gives first to his wife for life, then to L., and then, looking at the card certainly, to L.'s first and other sons; they are to take before the next letter, there can be no doubt about that, and then the difficulty which I should have had as to what estate was taken under that devise would have been upon the direction (page 3) that the grandson shall inherit in every

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case before the next taker. As to grandsons, it has been argued very strongly at the Bar—indeed, the case has been exceedingly well argued on both sides,—that if sons can be read as words of purchase, and are to be so read, then grandsons must be equally read as words of purchase. Now I think that is a fallacy, for this reason, that where you read “son” as a word of purchase, there is a gift to the son, but it is not so as to the grandson; but there is a description of the order in which the inheritance shall go. He may be supposed to say: “You L. (that is Gilbert East) shall take it for your life, then your first and other sons shall have it according to primogeniture. And a grandson in each case shall inherit before the next son.” In that way the sons of the son were to take, although there was no estate in tail male created in the first taker, so that it clearly leads you to ascertain that the intention of this testator was to make these persons tenants for life, with remainder to their first and other sons in tail male.

The way in which the testator manages his will in making the estates go over is by inserting conditions which are to be complied with; and declaring that on non-compliance *with those conditions the estate is to go over. Page 10 is an instance of this. He has in that place embodied the threats which are elsewhere contained as to non-compliance with the conditions; but instead of putting the limitation first and the conditions last, he has thought fit to reverse the common order, and he puts his conditions first; and then he says the limitations over shall be the same as upon non-compliance with the conditions. The meaning is plain enough, although it is singularly expressed.

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When we come to the Fifield property, there can be no doubt that an estate for life was created there, with remainder to the first and other sons. I should entirely agree that it would be very difficult to import that into the first part of the will so as to found upon it a decision that under No. 1 the party takes for life, with remainder to his first and other sons, if it were not that there are some words in the will itself that rather lead to the adoption of such a course. The testator says he is possessed of those forty-nine acres, and he leaves them thus (his Lordship read p. 13). So that he does here, in the gift of the Fifield estate, expressly refer to the gifts in No. 1, and says that it is his intention in this, as well as in those cases, that a grandson legitimate shall inherit before a younger son. It would be rather difficult, therefore, to come to the conclusion that you are to put one construction on the

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Fifield estate clause, where there is a reference to another clause, and a different construction on that to which that reference is made. It strongly tends to show what was the intention of the testator.

[*561] We pass on, and we find that which is also entitled to attention, namely, a gift of heirlooms; those heirlooms are to be enjoyed with the estate from one person to another. That is not conclusive at all; but it points, as much as *such a matter can, to a regular limitation in strict settlement, and so far it is entitled to some attention.

We then come to that which has been before remarked upon, I mean the gift of the Suffolk estate; and I must observe, that it appears as if the testator, when he prepared this part of the will, had some precedents before him; because, although the words are not exactly accurate throughout the gift to his own issue, yet they are sufficiently legal words to create clear estates tail. It seems, therefore, that he knew well enough, when he intended it, how to create such estates. So far, therefore, it seems to me that the evidence of intention becomes clearer as you advance in this will. After a time it becomes impossible to entertain any doubt, the conviction becomes stronger from point to point, till you come to a conclusion which is irresistible as to what was the testator's real intention. Now here it is simply giving the estate generally in words to make the possessor tenant for life, and after him his first and other sons tenants in tail male. The devise of the Suffolk estate is to be read thus (I am not following the words of the will, but I am stating to your Lordships how the devise should be read): to the widow for life, then to M., which means of course for life, afterwards to his eldest legitimate son and *his* issue male; if he had no issue male, to M.'s other legitimate sons, in order of primogeniture, in like manner "as in the case of L." (who is the present appellant) "at page 2, and I mean and order,"—I call your Lordships' attention to these words,—"I mean and order that this mode shall prevail throughout the whole entail, under precisely the same injunctions." I understand him there, in speaking of the mode and order which "shall prevail throughout the whole entail under precisely the same injunctions," to refer to every entail in his will; he is dealing with the entail as an entail, although portions *of his property are given to different persons; yet by his own settlement, which this will was, of the different estates, different estates tail were created, and these words to my mind are perfectly

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conclusive—they include the whole of these limitations, particularly this limitation to L., and therefore manifestly in that way there is a clear limitation to L. for life, with remainder to his first and other sons in tail male. In these gifts over, in page 48, you will find, and this is very material, that L. himself is included in this very limitation. Now it would be impossible to hold, after that reference to the gift of the great bulk of the property as being subjected to the same limitations and injunctions, that he intended to give one estate in the Suffolk property and a different estate in the rest of the property.

My Lords, I have therefore come to the conclusion that this is clearly an estate for life in the appellant, and that the decision of the learned Vice-Chancellor TURNER is correct.

I think that in all these cases it is indispensable, in coming to a right conclusion, that your Lordships should go beyond the life estate and ascertain, before you lay it down that it is a clear life estate, what are the estates to follow it. There is nothing so easy as to decide on a particular will that a man takes for life, not following up that decision by a declaration of who is to take after, and in what character, and what the estates are; whereas if your Lordships were to follow up the declaration that a particular person takes for life, with an enumeration of the persons to take after him, perhaps in some cases in which life estates only have been given, it would be difficult to reconcile the declaration of the tenancy for life with the limitations to follow. I think, however, that there is no such difficulty here, and I have no hesitation in expressing my opinion not only that this is an estate for life in Sir Gilbert *East, but that the remainders after that are estates in tail male to his first and other sons. The prayer of the bill is for a conveyance, and I should, with the consent of your Lordships, desire to suggest that we should make a declaration, so that there may be an end of the litigation as regards these estates.

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Mr. Bates : Perhaps your Lordships will allow me to apply that it may be referred back to the Court below, to approve of a proper settlement according to the declaration now made by your Lordships?

LORD ST. LEONARDS :

We should have no objection to that ; we should declare that the appellant is tenant for life, with remainder to his first and other

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sons in tail male, and that he is not entitled to the chattels absolutely, but only for life; and refer it to the Court below to approve of a settlement, founded upon that declaration.

THE LORD CHANCELLOR:

I think so. I shall therefore move your Lordships that the decree of the COURT below be affirmed, with a declaration to the effect mentioned by my noble and learned friend. Proper directions will be given, subject to that declaration, as to the chattels.

LORD ST. LEONARDS:

Certainly; the House declaring he is entitled to those chattels only for life. The costs should come out of the fund, for the testator himself has created the difficulty.

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(4 H. L. C. 565—623; S. C. 13 Jur. 1036.)

1854.
June 21.
July 4.
Aug. 5.
—
Lord
CRANWORTH,
L.C.
Lord
BROUGHAM.
MARTIN, B.
PARKE, B.
ALDERSON, B.
PLATT, B.
CROMPTON, J.
TALFOURD, J.
CRESSWELL,
J.
ERLE, J.
WILLIAMS, J.
WIGHTMAN,
J.
COLERIDGE,
J.
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A. became tenant to B. of a colliery and also of some farm land, at distinct rents. The lease contained very numerous covenants as to the payment of the rents, and as to the management of each property. The term created was for forty-two years; but the tenant was to have liberty to put an end to the term, on giving eighteen months' notice before the expiration of the first eight years, or of any subsequent three years. The proviso which gave the tenant this liberty, after describing the giving of the notice, contained these words: "Then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed), this lease, and every clause and thing therein contained, shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, cease, determine, and be utterly void. . . . But nevertheless, without prejudice to any claim or remedy which any of the parties hereto may then be entitled to for breach of any of the covenants or agreements hereinbefore contained."

The Court of Exchequer had held that this proviso did not make the performance of all the covenants a condition precedent to the tenant's power to put an end to the lease. The Court of Exchequer Chamber held that the proviso did make the performance of the covenants a condition precedent.

The Lords were equally divided, and so the judgment of the Exchequer Chamber was affirmed.

THIS was an action of covenant for rent, brought by Thomas Friar, as reversioner, against Grey and others, as surviving lessees of a colliery or coal mine, and a farm, situate in the parish of Northam, in the county of Durham.

The lease upon which the action was brought, dated 30th April,

(1) Referred to, *Bastin v. Bidwell* (1881) 18 Ch. D. 238, 248, 44 L. T. 742.

1838, was granted for a term of forty-two years, commencing 12th May, 1838, determinable, as after mentioned, *at a fixed rent of 280*l.* per annum for the colliery, on a calculation that there would be annually raised therefrom 134,588 bolls of coal, and 51*l.* per annum for the land, payable half-yearly on the 11th of November and the 12th of May in each year. If an increased quantity of coal should be obtained, an increased rent was to be paid; if the quantity of coal obtained in any one year should be less than the 134,588 bolls, the rent of 280*l.* was still to be paid, but the deficiency in the coal obtained was to be made up from any surplus quantity obtained in any three succeeding years during the continuance of the lease, but not afterwards. The lease also contained numerous covenants by the lessees, both with respect to the colliery and the farm, and then followed a proviso enumerating these covenants, and providing that if the rents, or any of them, or any part thereof, should be in arrear for forty days, or if payment of money which might be awarded to be due from the tenants for the exercise of any of the powers and liberties granted in the lease should not be duly made, or if any such award should not be obeyed, or if pits not wanted for air or water should not be filled up, or if the carrying on and management of the colliery should be neglected, or if sufficient walls and pillars of coal to support the roof should not be left, or if any thing should be done, or neglected to be done, whereby the colliery might be drowned with water, or otherwise damnified, or if a barrier of twenty yards should not be left against the adjoining collieries, or if the coal under any houses should be disturbed within twenty yards of the site, or if monthly accounts of the quantities of coal wrought should be refused to be presented to the lessor, or if he should be hindered from inspecting the books or gauging the corves, or if the tenant should not keep the houses, &c. in repair, or should demise or assign the colliery without license, or *should enter into partnership with persons except as named in a preceding covenant (namely, those who were of kindred by blood or marriage), or should not manage the lands in the manner specified, or should obstruct the lessor in making trials in working coal, or should become bankrupts, then in any or either of the said cases the covenant for quiet enjoyment hereinafter contained shall cease and be void; and it shall be lawful for the lessor, his heirs or assigns, to enter upon and take possession of the demised premises, and the same to have again, re-possess and re-enjoy as of his or their

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former estate. * * Provided also, that if the lessees, their executors, &c., shall be desirous to quit the said premises hereby demised at the end of the first eight years of the said term, or at the end of the first or any subsequent three years after the expiration of the said eight years, and of such their desire shall give to the lessor, his heirs or assigns, notice in writing eighteen calendar months before the expiration of such eighth year, and thereafter before the expiration of any such three years (as the *case may be), then in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed,) this lease and every clause and thing herein contained shall, at the expiration of the first eighth year and thereafter at the expiration of any such third year (whichever in the said notice shall be expressed), cease, determine, and be utterly void to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired; but nevertheless without prejudice to any claim or remedy which any of the parties hereto or their respective representatives may then be entitled to for breach of any of the covenants or agreements hereinbefore contained."

The lease then contained certain covenants on the part of the lessor, and concluded with an arbitration clause, by which, in the event of any question or dispute arising between the parties relative to or concerning the amount of any damage or compensation to be paid under the lease, or any covenant, clause, word, matter, or thing therein contained, either of the said parties could require and obtain a settlement thereof by arbitrators to be chosen as therein mentioned. The declaration assigned two breaches—one being the non-payment of rent for the colliery for two years and a half, commencing on the 12th day of May, 1847, and ending on the 11th day of November, 1849; the other being for two years and a half rent of the farm, beginning and ending at the same times.

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The defendants, by their plea, after setting out the lease on *oyer*, stated that the whole of the rents alleged in the declaration to have become due and payable, had become due and payable after the 12th day of May, 1846, and after the lease had been determined, and they said that they, being desirous to quit the demised premises at the end *of the first eight years of the said term, did, eighteen calendar months before the expiration of the first eight years of the said term, give to the plaintiff notice in writing of such their desire, and thereby gave him notice that they would

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quit and deliver up possession of the said demised premises on the 12th day of May, 1846, being the end of the first eight years of the said term: And the defendants further said that, at the expiration of those eight years, all arrears of the said rents so reserved and made payable by the said indenture having been paid, and all and singular the covenants and agreements in the said indenture contained on the part of the lessees having been duly observed and performed at the expiration of the said first eighth year of the said term, the said lease, and every clause and thing therein contained, ceased, determined, and were utterly void to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired.

The plaintiff replied, that all and singular the covenants and agreements in the said indenture contained on the part of the lessees had not been duly observed and performed at the expiration of the said first eighth year of the said term, in manner and form, &c.; but that, on the contrary, after the making of the said indenture, and during the term thereby granted, and before the expiration of the first eight years of the said term, the lessees wilfully and negligently omitted to draw and pump out of the said colliery and coal mines divers large quantities of water, which, during, &c., was standing, remaining, and being therein, and which they then might and ought to have drawn and pumped thereout, and that by reason and in consequence of such neglect and omission, the said collieries and coal mines then became and were drowned and overburdened with water from waters in the said colliery, contrary to the said indenture *and the covenant of the lessees in that behalf, and that at the expiration of the said first eight years of the said term the said last-mentioned breach of covenant was still subsisting and continuing.

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To that replication the defendants put in demurrers, both special and general. The judgment, which proceeded on the general demurrer alone, was, on the 16th July, 1850, given for the defendants (1).

A writ of error was brought upon that judgment, and on the 20th of May, 1851, that Court reversed the judgment of the Court of Exchequer, and gave judgment for the plaintiff below (2).

The present writ of error was then brought. The Judges were summoned, and Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Baron Platt, Mr. Justice

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Williams, Mr. Justice Erle, Mr. Justice Cresswell, Mr. Justice Talfourd, Mr. Baron Martin, and Mr. Justice Crompton attended.

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Mr. Hugh Hill and Mr. Willes, for the plaintiffs in error :

The rule of construction in a case like the present is, that the parties to the deed must intend to mean what the words they have used in the proviso indicate, unless such a construction of the words should involve inconveniences that would frustrate the object which these parties had in view, and then the other portions of the instrument must be examined, to see what is the sense to be attributed to the particular words: *Kemble v. Farren* (1), *Horner v. Flintoff* (2). Here the * * inconvenience of preventing the tenants from terminating the lease by notice, would be very considerable ; for *The Marquis of Bute v. Thompson* (3) shows that a fixed rent, such as exists here, is payable as long as the lease lasts, though after the tenant's entry it should be found that coals cannot be got, or not got in the quantity in respect of which that rent was fixed. The construction, therefore, of this proviso as a condition precedent, would put the parties on an inequality. The clause of the proviso beginning "But nevertheless" does indeed speak of "the covenants hereinbefore contained," but there is not, previous to that clause, any covenant for any act to be done by the lessor, so that the proviso does not operate to preserve the rights of the lessee on the covenants in his favour.

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A case directly in point with the present is that of *Dawson v. Dyer* (4), where the lessee covenanted to pay the rent, and the landlord covenanted that he, "paying the *rent" at the appointed times, should quietly enjoy. On disturbance in possession, the lessee was held entitled to bring covenant, though when the cause of action accrued the rent had been in arrear beyond a period at which the landlord was entitled to enter as for a forfeiture, for the payment of rent was held not to be a condition precedent to the performance of the covenant for quiet enjoyment. The case of *Boone v. Eyre* (5) is directly to the same effect. * * That case was recognised in *The Duke of St. Albans v. Shore* (6). It never could have been intended that it should be requisite that to reserve to themselves the right given by this proviso, the tenants should

(1) 31 R. R. 366 (6 Bing. 141).

(2) 60 R. R. 866 (9 M. & W. 678).

(3) 67 R. R. 688 (13 M. & W. 487).

(4) 39 R. R. 566 (5 B. & Ad. 584).

(5) 2 R. R. 768 (1 H. Bl. 273, n.).

(6) 1 H. Bl. 270 ; see also *Gibben v. Young*, 19 R. R. 510 (8 Taunt. 254), and *Fothergill v. Walton*, 20 R. R. 567 (8 Taunt. 576).

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literally perform every one of these stringent and almost impossible covenants; some of them, indeed, could not be performed during the existence of the lease: and then, unless it can be argued that some are conditions precedent while others are conditions subsequent, the construction contended for by the other side cannot be put on this clause in the lease. * * *

The case of *Porter v. Shephard* (1) will be relied on by the other side, but that case does not govern the present. The words there were "from and after," and that difference of expression clearly distinguishes the two cases from each other. Another ground for the judgment of the Court there was, that if the lease was put an end to, the landlord would be left without remedy for covenants broken; but here the proviso itself obviates that difficulty, and the construction that might otherwise be put upon the words that "this lease, and everything therein contained, shall be void, as if the term had run out and expired," will not be applicable. * * *

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The principles and authorities which must govern this case are all considered in the note to *Pordage v. Cole* (2). In *Stavers v. Curling* (3), the words were "on the performance of the above-mentioned terms and conditions," and they were held not to constitute a condition precedent, Lord Chief Justice Tindal observing, even as to that strong form of expression, that "courts of justice are more anxious to discover and be governed by the intention of the parties than to follow the strict and technical form of words used in the instrument." On that principle the cases of *Hays v. Bickerstaffe* (4) and *Allen v. Babbington* (5) had long previously been decided. In the former, the words were "paying the rent and performing the covenants," in the latter, "paying" alone; and in each case it was held that there was no condition precedent, though, as to the former of these cases, it must be admitted that the report says, "Atkyns, Justice, doubted." The principle, however, there acted on by the majority of the Court, has always since been recognised: the intention of the parties must govern: *Warren v. Asters* (6). In *Dawson v. Dyer* (7), the case of *Simpson v. Titterell* (8) was referred to for a contrary purpose. * * *

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(1) 3 R. R. 305 (6 T. R. 665).

(6) Sir T. Jones, 205.

(2) 1 Wms. Saund. 320, n. 4.

(7) 39 R. R. 566, 569 (5 B. & Ad.

(3) 43 R. R. 682 (3 Bing. N. C. 355). 584, 587).

(4) 2 Mod. 34.

(8) Cro. Eliz. 242.

(5) Siderf. 280.

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The words "all and singular the covenants and agreements on the part of the lessees having been duly observed and performed," if taken as constituting a condition precedent, will render it necessary that everything, not merely the subject of covenant but of ordinary agreement, shall have been duly performed, before the lessee can give a valid notice to put an end to the term. But some of these matters, such as that relating to arbitration and to the performance of the award, refer to things which it would be impossible to perform till after the expiration of the term ; and even as to the payment of rent itself, it cannot be pretended that all the rent must be paid before the notice could be given, for some portion of it would not then have accrued due, the more especially as its amount might be increased by the working of an increased quantity of coal. * * *

Mr. Bramwell and Mr. Manisty, for the defendant in error :

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This case is one of great importance, for many leases are in this form, and the decision here must affect property to a great extent. Unless the words here are construed as constituting a condition precedent, they become wholly inoperative. It may be admitted that the intention of the *parties must govern any mere form of words, the proposition for which *Stavers v. Curling* (1) has been cited ; and then it is contended that the intention of the parties here was to create a condition precedent. No doubt could be entertained on the subject, except for the last clause in the proviso. Then what is the meaning of that clause ? It cannot be that it should have the effect of allowing the tenant to give a compulsory notice to quit, though no rent should have been paid and no covenants performed. Yet such is in truth the meaning that the other side would give it. The proper effect of the clause is to give to the landlord, and not to leave to the tenant, the absolute option of determining the lease by a notice. And such would naturally be the intention of the parties. Such was the construction put by the Court of King's Bench on a similar proviso in a lease, in the case of *Doe d. Bryan v. Bancks* (2). * * It is not at all incongruous that the lease should be put an end to, and yet that an action for any breach of covenant committed during the continuance of the lease should be preserved (3). The lessee had expressly agreed that the

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(1) 43 R. R. 682 (3 Bing. N. C. 355). *Cox*, 88 R. R. 69, 87 (3 H. L. C. 240,

(2) 23 R. R. 318 (4 B. & Ald. 401). 275).

(3) See *The Attorney-General v.*

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lessor should have the power to re-enter for every breach but that of non-payment of taxes. That circumstance is relied on by the other side to show that the performance of every one of these covenants could not be required as a condition precedent to the right to give notice to determine the lease. But the answer is, first, that the parties may choose to enter into such an agreement, and next, that here they have done so, having, no doubt, trusted to each other's fair and liberal dealing, and the lessor was evidently intended to have an option which was not extended to the lessee.

Then as to the authorities. *Lister v. Lobley* (1), and cases of that kind, are not in point for the construction of voluntary agreements between independent parties. The first case that is applicable to the present is that of *Porter v. Shephard* (2), and that is a conclusive authority. The particular words there used do not distinguish it from the *present. *Dawson v. Dyer* (3), too, though quoted on the other side, may be relied on for the defendant in error, for though the decision there seems to be the other way, the reasons given are in favour of the defendant in error; and the remark of Mr. Justice PARKE (4) on the case of *Simpson v. Titterell* (5), which had been cited in argument, establishes the rule that "a proviso always implies a condition, if there be not words subsequent which may change it into a covenant." The proviso here is the condition, and there are no subsequent words which have the effect of converting it into a mere covenant. The reasoning of that observation applies with full force in the present case.

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The second part of the proviso here cannot be allowed to control the former, for that would be to erase the covenant contained in it, which the law will not allow: *Saward v. Anstey* (6), *Hesse v. Stevenson* (7). The case of *Thornhill v. Hall* (8) laid down the rule in the strongest terms, that when an interest is given, or an estate conveyed, in one clause of an instrument, in clear and decisive terms, it cannot be taken away or cut down by any subsequent words that are not as clear and decisive as the words of the clause giving the estate or interest. * * *

Mr. Hill, in reply :

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There is nothing here which shows that the lessees meant to bind themselves for forty-two years to what might be a very unprofitable

(1) 7 Ad. & El. 124.

(5) Cro. Eliz. 242.

(2) 3 R. R. 305 (6 T. R. 665).

(6) 2 Bing. 519.

(3) 39 R. R. 566 (5 B. & Ad. 584).

(7) 44 R. R. 880 (3 Bos. & P. 565).

(4) 39 R. R. 569 (5 B. & Ad. 587).

(8) 37 R. R. 1 (2 Cl. & Fin. 22).

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concern, and to give to the landlord the option of refusing to free them from it. *Doe d. Bryan v. Bancks* (1) does not support the argument for which it is cited. That case was determined on its own peculiar circumstances. There had been a breach of a particular covenant, the landlord had received rent, another breach of the same covenant occurred, and it was held that, though the covenant said that the lease should "be void" if that covenant was broken, those words did not operate against the landlord. That decision was correct, for otherwise the tenant, by his own wrongful act, might have put an end to the lease; but that decision does not touch the present case. The difference in the expressions in *Porter v. Shephard* (2) makes that case also distinguishable from the present. There was not in that case anything like the proviso "but nevertheless" to be found here, while there the words "from and after" gave a definite and absolute meaning to the other part of the clause. In *Saward v. Anstey* (3), the covenant was not restrained by any subsequent words, but here it is so restrained. *Stavers v. Curling* (4) proceeded upon principles which must govern the present case; and there are no circumstances here which render those principles inapplicable.

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The LORD CHANCELLOR, having stated the circumstances of the case, said that he did not think it necessary to embody these circumstances in the form of a supposed case for the opinion of the Judges, but should give the Judges the record, and as the question raised upon it was purely one of law, should propose simply to ask them, "Whether on this record judgment ought to be given for the plaintiffs in error, or the defendant in error?"

Lord BROUGHAM entirely agreed with this mode of putting the question in the present instance.

The question was agreed to, and was put to the Judges.

Mr. Baron PARKE, in the name of the Judges, requested time to answer it.

July 4.

MR. BARON MARTIN :

In answer to the question proposed by your Lordships to the Judges, I have to state that, in my opinion, judgment ought, on this record, to be given for the plaintiffs in error.

(1) 23 R. R. 318 (4 B. & Ald. 401).

(3) 2 Bing. 519.

(2) 3 R. R. 305 (6 T. R. 665).

(4) 43 R. R. 682 (3 Bing. N. C. 355).

The question between the parties is, whether the performance of the covenants contained in the lease was a condition precedent to the determination of the lease by the lessees under the proviso? I am of opinion that it was not.

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It is clear that, notwithstanding the determination of the term by the lessees, it was contemplated by the parties that the lessor might have a then existing cause of action against them for breaches of covenant, for the concluding words are for the express purpose of protecting this right; but this appears to me inconsistent with the contention on behalf of *the defendant in error, for, according to it, the precise observance of all the covenants is a condition precedent to the lawful determination of the term at all; and if a single one of these covenants had ever been broken, the power of the lessees to determine it was absolutely gone. It has been said that these concluding words are for the purpose of securing to the lessor the right of action upon the covenants, should it be discovered that they had been broken after he had acted on the notice to determine given by the lessees. They are quite unnecessary for this purpose, for the right of action would exist without them; but when it is considered that the notice required by the proviso is for so long a period as eighteen months, it does not occur as likely that a want of knowledge as to the performance or non-performance of the covenants at the time of the determination of the lease was contemplated. It seems to me that the more reasonable mode of construing this proviso is, to hold that the lessees are at liberty absolutely to put an end to the term at the expiration of the eighth year, but that nevertheless they shall remain and be liable for any breaches of covenant which they may have committed, and that upon payment of all arrears of rent (the word "arrears" itself indicating a breach of the covenant to pay the rent), and all the covenants being observed and performed or satisfied, then that not merely the term itself, but all the obligations created by the covenants in the lease, shall cease and be at an end.

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This construction, *reddendo singula singulis*, gives effect to every word in the sentence, and, as I think, is a fair and reasonable construction of it. But assuming that there is a difficulty in giving it this construction upon the mere words of the proviso itself, there can be no doubt, I apprehend, that it was the intention of the parties that the lessees should have the power of determining the lease at the end *of the first eight years of the term, and that this was meant to be a real power, and not a merely delusive one. Now,

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looking at the covenants contained in the lease on the part of the lessees, if the performance of these covenants be held to be a condition precedent to the power of putting an end to the lease, it is, to my mind, absolutely certain that the power could never be exercised at all. The slightest deviation from any covenant would put an end to the power; for instance, their having in tillage more than the prescribed quantity of land, the not summer-fallowing the precise number of acres specified, the not ploughing this fallow five times, however unfit and improper it might be to do so, in consequence of a wet season; the not laying upon every acre the precise specified quantity of lime (there being covenants in the lease as to all these particulars), would, upon the construction contended for on behalf of the defendant in error, absolutely extinguish the power of determining the lease. There is also a covenant that after the harvest next preceding the expiration or sooner determination of the term, the lessees should keep uneaten and free from trespass, all the land on which grass seeds had been sown with the crop next preceding. Now, supposing the lessees had, eighteen months before the expiration of the first eight years, given a notice, perfectly valid in every respect, of their desire to put an end to their interest, and had always paid the rent upon the very days when it became due, and had actually performed and fulfilled every covenant in the lease, yet if, upon the day next before the expiration of the eight years, the cattle of a neighbour had come over the fence and trespassed upon the land on which the grass seeds had been sown, then, according to the argument on behalf of the defendant in error, the power to determine the lease was gone, and the lessees would thereby become absolute *tenants for the entire period of forty-two years. I cannot think that this was the real intention of the parties.

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The rule laid down by Serjt. Williams in his note to *Pordage v. Cole* (1), which I have always understood to be the ruling authority upon the subject, is, that questions of this kind are to be decided according to the intention and meaning of the parties, and the good sense of the case, and that technical words should give way to such intention. And it certainly seems to me that good sense dictates that a construction should be avoided which practically renders a determination by the lessees of the lease an impossibility; and that it is more reasonable that the power to determine it should be deemed unconditional, whilst at the same time there is secured to the lessor the full and entire protection of the covenants in his

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favour, until they all are either fully performed or satisfied. The case of *Hays v. Bickerstaffe* (1) seems also to be strongly in favour of the plaintiffs in error. In a subsequent part of the lease here declared on, there is a covenant on the part of the lessees, that it shall be lawful for them, they well and truly paying the rent at the appointed days, and performing all and singular the covenants and agreements on their parts to be kept, observed, and performed (but not otherwise), peaceably and quietly to enjoy the premises demised. I cannot distinguish between the words in this covenant and the words in the proviso; indeed, if anything, the words in the covenant seem to me more directly to make the payment of rent and the performance of the covenant a condition precedent to the obligation of the covenant attaching; for the words "but not otherwise" occur in it, and not in the proviso. Nevertheless, in *Hays v. Bickerstaffe*, the COURT held that the *words "paying the rent and performing the covenants," did not render the performance of these acts a condition precedent to the covenant for quiet enjoyment attaching, but that the covenant was absolute; and this case, I believe, has been acted upon ever since its decision. The judgment of the Court of Common Pleas, in *Stavers v. Curling* (2), is also, in my opinion, in favour of the plaintiffs in error. The master of a ship had bound himself to the performance of a great many terms and conditions, and the owner covenanted that, on the performance of the terms and conditions, he would pay the plaintiff a certain proportion of the net produce of the profit of the adventure. The Court of Common Pleas was of opinion that the performance of the terms and conditions was not a condition precedent; and Chief Justice TINDAL, after referring to *Boon v. Eyre*, as the leading case on the subject, says "that courts of justice are more anxious to discover and be governed by the intention of the parties, than to follow the strict and technical form of words used in the instruments." The case of *Porter v. Shephard* (3) was strongly relied upon on behalf of the defendant in error, as being conclusive in his favour. There can be no doubt that it is perfectly competent for parties, if they think fit, to render the strict performance of all the covenants in a lease a condition precedent to a power by the lessee to determine it by a notice; but I own I very much doubt whether the words in the proviso in question, assuming the concluding part as to the preservation of the right of action in respect of the broken covenants

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(1) 2 Mod. 34.

(3) 3 R. R. 305 (6 T. R. 665).

(2) 43 R. R. 682 (3 Bing. N. C. 355).

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not to exist, are sufficient for the purpose. I do not think the argument of *Mr. Wood* in that case received sufficient attention from the Court; and I am disposed to think that the same principle which prevents a sum of money being *treated as liquidated damages, when it extends to a variety of minute breaches of contract, would also prevent such general words as the present from being deemed to create a condition precedent, when the slightest breach of one of a very great number of covenants (some of very trifling consequence indeed) would extinguish so valuable and important a power as that of the determination of the lease. I should be inclined to say that, under such circumstances, the parties had not used sufficiently apt words, and not sufficiently expressed their intention to this effect.

For these reasons I think that, upon this record, judgment ought to be given for the plaintiffs in error.

MR. JUSTICE CROMPTON, having stated the circumstances of the case, said:

Whether particular words do or do not amount to a condition precedent, must be gathered from the real intention of the parties, as appearing upon the whole instrument. If such intention is apparent, the parties must be bound by the bargain which they have chosen to enter into; but in ascertaining the meaning and true construction of the deed, it is by no means unimportant to observe what the effect of the construction, one way or the other, would be. Accordingly, the counsel for the plaintiff in error, in their argument, pointed out the multiplicity and minute nature of the covenants contained in this lease, and argued, from the impossibility of performing all of them to the letter, that the parties were not likely to have intended that the benefit of this clause was to be lost to the lessee by the infraction of any of the numerous and minute covenants.

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A proviso of this kind, being for the benefit of the lessee, and being one in its nature to be useful only when the lessee desires to put an end to his lease against the will of his lessor, it seems hardly likely that the arrangement *should be such as to leave it practically in the power of the lessor to say whether the lessee should ever be able to avail himself of it or not. I quite agree with what was said in the Exchequer Chamber, that these reasons would not justify the Court in refusing to put the construction upon the words which they plainly require; but they appear to me to be important in ascertaining what that construction is, and whether the words do

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not really bear a construction leading to consequences which the parties were not likely to have contemplated. Words capable of being treated as conditions precedent to rights of action have, in many cases, some of which were cited at the Bar, been construed as not amounting to conditions precedent, by looking at the provisions of the whole deed as assisting to ascertain the meaning and construction of the particular expressions; and words of this nature cannot be said necessarily to amount to conditions precedent, as they are not construed to do so when they occur in the common case of covenants for quiet enjoyment.

It was said on behalf of the plaintiff below, that he might reasonably have wished to guard himself, and that he had guarded himself, by words of express condition, against being left, on the determination of the term, with the covenants broken, with the property out of repair, and with the rent unpaid; and several arguments founded upon different parts of the deed, and upon the probable intentions of the parties, to be collected from the whole deed, were insisted upon at the Bar for each party; and the question now is, "What is the construction to be put upon the proviso in question, occurring in a deed containing the stipulations relied upon by the respective parties?"

To make out that the proviso in this case was a condition precedent, the case of *Porter v. Shephard* (1) was *relied on. In that case words nearly similar to those in the commencement of the proviso in the present case were held to amount to a condition precedent. There were, however, in the proviso in that case no words contemplating that the covenants might be broken, and yet the term be determined by the notice; whilst in the present case I find it stated what is to take place in case the covenants have not been performed, although the term has been determined by the notice.

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It seems to me impossible to say that the words clearly show that the performance of the covenants is to be a condition precedent to the determination of the term, when there are provisions, though probably unnecessary ones, for recovering damage for prior breaches of covenant in case of the lease being determined by notice.

On reading the whole proviso together, including the clause beginning "But, nevertheless," it will be found that the events of the covenants having been duly performed, and of their not having been duly performed, are both contemplated, and that the clause

(1) 3 R. R. 305 (6 T. R. 665).

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provides for each of those cases. It seems, then, to have occurred to the minds of the parties, that there may be covenants broken at the time of the expiration of the notice; and that it would not be proper that in such case the lease and all the clauses should be utterly void, as they have stipulated that they should be on the other contingency. What then is to be collected from the words they use, as to their intention in such a case? Is it that the lease is not to be determined, and that the proviso is to be lost to the lessee? It seems to me that such cannot have been their intention, for they say, "But, nevertheless, without prejudice to any claim or remedy which any of the parties may then (that is, at the time of the determination of the lease) be entitled to for breach of any of the covenants or agreements hereinbefore *contained" (these being, as was stated in the argument, covenants on the part of the lessees). The effect seems to me to be, if all the covenants are duly performed, the term is at an end; the lease is waste paper, and the clauses are all void; but if the covenants have been broken, the parties do not say that the term is not to be ended, but they make other provisions, and say that the clauses containing the remedies for such breaches to which they are then entitled, notwithstanding the determination of the term, shall still continue. It is not said that in such case the term shall not cease, but that in such case there shall be a right of action, and that the clauses in question for that purpose shall still be in existence.

The word "nevertheless" appears to me to mean, although the lease is determined; and I can give no other effect to the expression, "but, nevertheless, without prejudice, &c.," except by supposing that the lease is to be determined, notwithstanding some covenants have been broken. The words "but, nevertheless," &c., seem to me to say, the lease shall terminate as in the former case, but in the case of any of the covenants having been broken, such covenants, and the clauses relating thereto, shall remain in force.

The suggestions which have been made in answer to the argument arising on the effect of the latter part of this proviso, do not appear to me to be satisfactory. I think that in a stipulation apparently framed to meet the case of claims and remedies for all breaches of covenant then existing, it is hardly probable that the parties were considering such cases as those of the lessor having acted on the notice, or assented to the determination of the lease by acceptance of the notice, either in ignorance of the breaches of covenant,

or meaning to waive them. I do not think that the stipulation is properly explained as referring to the rights *of the lessee, as it distinctly applies and refers to the claim and remedies of any of the parties, and as the covenants mentioned in the early part of the proviso as "the hereinbefore-mentioned covenants" are almost entirely, if not altogether, covenants on the part of the lessees. Nor do I think that the stipulation has reference only to breaches of some of the covenants, which, it was said, might be committed after the determination of the term, as I think that the words "to any claim or remedy which any of the parties may then be entitled to for breach of any of the covenants hereinbefore contained," distinctly refer to breaches committed before the determination of the lease. The stipulation being general, as to breaches of covenant, and applying to all breaches as to which a claim might be subsisting, I see no reason to suppose that the parties were referring to cases only which appear to me to be far-fetched, and not the ordinary cases likely to occur, or to have suggested themselves to the minds of the parties as being necessary to be provided against, whilst I think it very likely that if the parties intended the term to be determined by the notice, notwithstanding the breach of the covenants, they would have thought it worth while, after saying that if the covenants were performed, the lease and all clauses should be void, to add, that they should not be void as to by-gone breaches of covenant, especially as at one time doubts seem to have been entertained as to the right to sue after the determination of the lease.

When so many learned persons have taken different views of this case, it would ill become me to express any confident opinion; but not being satisfied that the parties intended to make the performance of the covenants a condition precedent, when they clearly appear to me to have contemplated that the lease might be determined, though the covenants had been broken, and not being satisfied with the *explanation of the stipulation at the end of the proviso suggested on the part of the plaintiffs below, I think that I ought to answer your Lordships' question by saying that in my opinion the plaintiffs in error, the defendants below, were entitled to the judgment as pronounced in their favour by the Court of Exchequer.

MR. JUSTICE TALFOURD :

In reply to your Lordships' question, I humbly submit my opinion that judgment ought to be given for the defendant in error.

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The consideration of the question involves a choice of difficulties, arising from an apparent conflict of two clauses placed by the framer of the lease in juxtaposition; by the first of which it would seem that all the covenants of the lessees must be performed before its avoidance, while the last purports to reserve, notwithstanding its avoidance, remedies to each party for breach of such of the covenants as precede the proviso. It will be convenient, firstly, to consider the import which the first clause would bear if standing alone; and, secondly, to inquire how far such import is affected by the subsequent words. Now, on the first view of the case, it can scarcely be contended that the performance of the lessees' covenants must not be regarded as a condition precedent to the avoidance of the lease. The words are similar to those contained in the case of *Porter v. Shephard* (1), except that in that case the precedence of the condition is indicated by the use of the words "from and after" applied to the avoidance, and in this case, by the use of the past tense, "having been," in the corresponding position. If the words have not this meaning, it seems scarcely possible to attach to them any meaning at all. *The only suggestion offered is, that they may be intended to qualify the avoidance of the lease, so as to prevent an apprehended destruction of the remedies arising out of it; that although the lease was to be determined absolutely at the end of the notice, it was only to be void, as the foundation of rights of action, when its covenants were fulfilled. But if so read, there would be no provision whatever for the determination of the term, apart from the perfect avoidance of the lease on the performance of the covenants, unless the first clause be taken from its position, and interpolated between words which are obviously mere cumulative expressions to denote the same thing, and would then be read thus: "Then and in such case, this lease shall, at the expiration of the eighth year, &c., determine and (all arrears of rent being paid, and all and singular the covenants on the part of the lessees having been duly observed and performed), be utterly void to all intents and purposes, in like manner as if the whole term of forty-two years had run out and expired,"—a transposition singularly violent. It may be that the introduction of the analogy between the determination by notice and efflux of time is not necessarily fatal to this supposition, as the parties who probably thought that words of entire avoidance of the lease might prevent the continuance of a remedy by action, may possibly have thought such to be the

(1) 3 R. R. 305 (6 T. R. 665).

law when leases expire by efflux of time ; but if they so thought, they have expressly provided against this imaginary mischief by the clause which follows, and which is perfectly apt for that purpose. Having reference, therefore, to these words themselves, and to their position by way of introduced parenthesis in the very body of the clause which gives to the notice its desired force, I can see no ground of doubt that they form a condition precedent to the determination of the term by the exercise of the option given to the *lessees. It has been argued, that the covenant for quiet enjoyment, which is clearly an independent covenant, is expressed in similar terms ; but this is otherwise, for the words applied to that covenant are present, not past,—“ paying the rents and performing the covenants ; ” which words are expounded by the proviso of re-entry itself, which refers to the covenant for quiet enjoyment, and provides that in case of any of the enumerated breaches, the covenant for quiet enjoyment shall cease and be void. It has also been argued, that the perfect performance of all the covenants on the part of the lessee is so difficult as to border on impossibility, and that therefore it is unreasonable to suppose it to have been contemplated as a condition precedent to the exercise of an option which it would render worthless. It has been answered, that this objection would apply to the ordinary proviso for re-entry, which, if strictly acted on by the lessor, and practically enforced by juries, would render every lease containing it determinable at the lessor's pleasure ; and this, although the analogy is not perfect, may well illustrate the species of confidence which persons who take leases habitually place in their lessors, that they will not vexatiously use the customary powers they insist on. But the truth probably is, that in the framing of the proviso in question, the parties did not intend to use the words “ duly observed and performed ” in their technical sense, as importing that no covenant during the eight years or longer period had ever been broken ; in which sense they are certainly unreasonable ; but in a sense in which they import a condition perfectly natural and just, namely, that before the expiration of the notice, the objects of the covenants should be attained, that is, that the works should be put into repair, the water pumped out of the mine, and everything done which the lessees were bound to do in order that they might *deliver up the premises in a proper condition to their landlord. The great length of the period of eighteen months, provided for the currency of the notice, seems intended for such a purpose ; and if this was the intention of the

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parties, it was more reasonable than the position alleged by the lessees, that they should be at liberty to throw the mine on the hands of the lessor in such a state as the replication suggests, only leaving to the lessor a remedy by action for damages. We come now to the words which, it must be admitted, create a difficulty: "But, nevertheless, without prejudice," &c. These words have no legal operation or effect whatever, as they merely express what the law in their absence would secure to the parties, rights of action on a determined lease. Still, although they avail nothing, they must mean something. To the suggestions made in the judgments of the Exchequer Chamber, that they may be intended to apply to after-discovered breaches, or to an acceptance of the notice by the lessor, notwithstanding covenants broken, or to the preservation of the right of the lessee to sue the lessor, may be added, that there are covenants to be performed by the lessee, and claims which may arise under the claim of arbitration, after the expiration of the term. If I might speculate on the cause of the introduction, I should attribute it to some doubt arising in the mind of the framer of the lease, whether there might not arise some case in which the rights of the parties to sue might be improvidently abolished; and thereupon he introduced superfluous words, not pointed to any particular covenant, but large enough to cover any, according to a practice of adding provisoes in modern legislation. If all these explanations should fail, still I should think that less violence will be done to the language of the lease by regarding the latter words as impertinent and unmeaning, as they are certainly inoperative, than by *striking out the former from the very body of the clause which gives the lessee that option on which his defence is based.

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For these reasons I think the decision of the Court of Exchequer Chamber is right, and that the judgment should accordingly be for the defendant in error.

MR. BARON ALDERSON :

After much consideration and some hesitation, I have come to the conclusion that this case cannot substantially be distinguished from the case of *Porter v. Shephard* (1), and that the performance of these covenants is, notwithstanding the introduction of the latter words in it, made by the lease a condition precedent to the power of the lessees by notice to determine it.

It is true that some inconveniences will follow from thus reading

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this proviso. There is a great variety of covenants in the lease, some of them more, some less, important; and to make the due performance of all a condition precedent to the power of determining the lease, is no doubt to give little effect to it on his behalf. But the words requiring all the covenants on his part to have been performed by him are plain and direct, and the opposite construction labours under a similar difficulty of giving no effect to words introduced clearly on the behalf of the lessor.

If I were to conjecture what the parties really meant, I should say that they perhaps meant to confine these words to the covenants for the breach of which the lessor was, by the clauses of the lease immediately preceding the proviso, entitled to re-enter, and not to all the minute and comparatively unimportant covenants, and that the breach of these was intended to be compensated under the words *immediately following, and, as it is said, qualifying the proviso. But however this may be, I do not think these words so far qualify the proviso here as to make the plain construction of the words of it other than a condition precedent to the determination by notice. Those words may have effect in giving to the lessor power, even if he accepts the notice, of still bringing actions for antecedent breaches of covenant,—a difficulty which was put to the Court in *Porter v. Shephard*; and this acceptance may have taken place in ignorance by the lessor of the breaches of covenant, which would be an additional reason for the insertion of those latter words. But I think that the condition precedent, even taking the words of it, may really mean that covenants broken, if the breach shall be compensated for before the expiration of notice, shall be considered as covenants duly performed within this proviso. For as rent in arrear, if paid before the expiration of the notice, clearly is within it, so the performance of the other covenants being found in conjunction with it, may bear the like interpretation.

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I answer this question of your Lordships, therefore, that in my opinion this was a condition precedent, and that the replication on this record is a valid replication, and that judgment ought to be given for the defendant in error.

MR. JUSTICE CRESSWELL :

The question proposed by your Lordships in this case depends upon the construction to be put upon a clause introduced by way of proviso in a mining lease. It is unnecessary, in following so many of my learned brethren, to refer to the pleadings, or to the

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various stages in which this question has been considered in the Courts below.

According to the opinions expressed in the Courts of *Exchequer and Exchequer Chamber, this proviso, if confined to the words already quoted, would have made the performance of the covenants and agreements contained in the lease a condition precedent to the determination of it by notice at the end of the first period of eight years, or any subsequent period of three years; that it could not be distinguished from *Porter v. Shephard* (1). In that opinion I entirely concur; and it seems to me that when the terms of the covenant for quiet enjoyment are compared with the terms of the clause in question, there can be no doubt that the parties intended to create a condition precedent. But it has been argued that the words which follow, "But, nevertheless, without prejudice," &c., qualify the former part of the proviso, and are inconsistent with giving it the effect of a condition precedent, for that assumes that no covenant has been broken, and that therefore no remedy or claim for such breach could exist, and that it being necessary to give, if possible, some meaning to every part of the lease, the proviso must be so construed as to have something upon which the latter part of it can operate, and that therefore the performance of covenants cannot be treated as a condition precedent to the determination of the lease. But if the former part of the proviso is so worded as to leave no doubt on my mind that the parties intended it to operate as a condition precedent, notwithstanding the addition to it, whereof the meaning may be very doubtful and obscure, I should still think myself bound to give effect to that which remains clear. The latter branch of the clause, however, as it seems to me, is capable of receiving a construction consistent with that which I take to be the plain meaning of the former part.

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The lessees *are to make compensation, from time to time, for damage of various kinds which may be done to the lessor by the exercise of the privileges conferred by the lease; and if differences arise respecting them, they are to be referred to arbitration. Now damage may have been done, and the compensation to be made not ascertained at the expiration of the notice, and the latter branch of the clause may have been introduced to keep unimpaired the claim of the lessor. Again, the lessees covenanted to indemnify the lessor against any claim that might be made against him by any of his tenants by reason of anything done by the lessees. Under that

(1) 3 R. R. 305 (6 T. R. 665).

covenant (although not broken at the expiration of the notice) the lessor might have a claim to which the latter branch of the proviso would be applicable. It may, therefore, have an operation consistent with that which it is agreed would be the construction of the former branch, had it stood alone. This gives effect to each part, without altering or putting a forced construction upon either. I am therefore of opinion that we are bound so to construe it, and consequently, that judgment should be pronounced in favour of the defendant in error.

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MR. JUSTICE ERLE :

I am of opinion that judgment should be given for the defendant in error, on the ground that the performance of the covenants in the lease by the lessee was a condition precedent to the power of determining the lease by notice. The form of words expresses this meaning, according to common understanding: "If the lessees shall give eighteen calendar months' notice before the end of the eighth year, then, all covenants on their part having been performed, the lease shall determine, as if it had expired."

The same form of words was decided to have this meaning *in *Porter v. Shephard* (1); and the provision is important to protect the landlord against the fraud or malice of the lessee, who, in the case of a mine, may so work as to obtain in a short time large profit and destroy the future capabilities for working, and, by bankruptcy or insolvency, get discharged from the damages awarded for breach of covenant, and by the notice free himself from further liability during the term; and unless this effect is given to these words, they are inoperative. The case for the plaintiff in error rested mainly on the proviso following this clause, viz., "But, nevertheless, without prejudice," &c.; and it was contended that if the lease could not be determined unless all the covenants had been performed, the proviso for remedy for breach of covenant in case of such determination would be inoperative. But a sufficient answer, in my judgment, was given to this objection in the Court below, that these words may apply either, firstly, to breaches which were not known to the lessor when he took possession of the mine; or, secondly, to breaches which he knew of, but elected not to insist on as conditions precedent to a determination of the term; or, thirdly, to breaches of covenant by the lessor himself. They may also have been intended to obviate an opinion which existed at one

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time, that the clause making the lease void on a given event, made it void as to breaches of covenant preceding that event; and it seems to me that all or some of these effects are to be given to the proviso, in preference to construing it to take away the effect of a condition precedent from the clause to which it is annexed, under which construction, though it operates to annul the condition precedent, the result is, that each *clause neutralizes the other, and the whole instrument is as if neither clause was in it; for upon a proviso for determining a lease by notice, if nothing is said about existing breaches of covenant, the remedy for them is not affected by the determining of the lease.

It is said that there would be inconvenience in restricting the power of determining it to the event of all the covenants having been performed, which would be almost an impossibility. To this one answer is, that if the parties agree so to stipulate, the law must give effect to the stipulation. It may also be answered, that the stipulation does not mean that there should not have been any breach of covenant during the term, but that when the notice expires there should not exist any cause of action in respect of performance of covenants. The stipulation for arrears of rent being paid, refers to a covenant which had been broken; but all cause of action for the breach having been satisfied by subsequent accord, and the covenant for rent would, within the meaning of this clause, be observed and performed, if all arrears of rent were paid before the expiration of the notice. So the covenant for repair, though broken during the term, would be observed if all repairs were at last completed. So in respect of other breaches; if the damage had been settled by arbitration and the amount paid, or if an action had been brought and the judgment satisfied, the legal duty of the covenantor, by reason of his covenant; would have been so far observed and performed, that all liability in respect thereof would be at an end. In this sense, the stipulation would be free from any hardship towards the lessee, as he might obtain the privilege if he did his duty. This construction does not depend upon giving a peculiar effect to the words of this instrument, for it seems to me that the same principle is applicable to all contracts. The legal effect of the promise *in every contract at common law is alternative, either to do the thing promised or make compensation instead. In some contracts the alternative is expressed when liquidated damages are stipulated for, in others the liability arises by implication of law, either to do or to compensate for not doing, according

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as may be settled by accord, or arbitration, or judgment. In all contracts the legal duty thereunder has been performed, and so the contract may be said in one sense to be performed, when either the thing contracted for has been done, or compensation instead thereof has been made.

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MR. JUSTICE WILLIAMS :

I am of opinion that on this record judgment ought to be given for the defendants in error. The question is, What did the parties mean by the proviso which gives power to the lessee to determine the lease by notice eighteen months before the end of the eighth year? It is provided, that if the lessee shall give such notice, "then and in such case, all arrears of rent being paid, and all and singular the covenants having been observed and performed," the lease is to determine. It is contended on behalf of the appellant, that this may mean that the lease is to determine by the notice, though the covenants have not been performed. That this construction is contrary to what the parties have said in the lease, can hardly be denied ; but it is contended, that if the proviso should be construed according to its very language, it would be extremely inconvenient, and that this inconvenience, having regard also to the final clause of the proviso itself, justifies a departure in construction from the natural and obvious sense of the words employed. The final clause guards against any prejudice being worked, by the determination of the lease, to any claim or remedy to which any of the parties may then be entitled for breach *of any of the covenants before mentioned. And this reservation to the lessor of a right to sue on broken covenants, is certainly inconsistent with the absolute proposition that the lease is not to determine if any of the covenants have been broken. And the question is, What effect ought this inconsistency to produce on the construction of the clause which is supposed to contain that proposition? It is said that the due effect of it is to show that the performance of all the covenants could not have been intended as a condition precedent to the right of determining the lease by the notice. In more untechnical language, this is nothing more or less (as it appears to me) than contending that what the parties have said shall be rejected ; inasmuch as they have said that the lease is not to be determined unless the covenants have been performed. Such an effect ought not to be given to this final clause, if its introduction can in any way be reconciled with the operation of the earlier part of the

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proviso. In order to examine whether this is possible, let the proviso be regarded as if it did not contain the final clause. Then (as it has been laid down in each of the four judgments already delivered on this clause) the authority of *Porter v. Shephard* (1), as well as the natural and obvious sense of the language, would leave no doubt of the parties having agreed that the lease was not determinable by notice unless the lessee had performed the covenants. Now suppose the lessee, after having broken some of the covenants, had duly given notice to determine the lease, which notice had been accepted by the lessor, either in ignorance of the breaches or choosing to waive them, and at the expiration of the notice possession had been delivered up to him; would it have been competent to the lessee to demand the possession to be restored to him on the ground that he had *not performed the covenants, and that consequently the lease was not determinable by his notice, but was still in force? Surely the answer would have been, that though, according to the terms of the proviso, the notice is to be of no effect if any covenant shall have been broken, yet it is in the option of the lessor whether he will avoid the notice on that ground. But the question might then arise, whether, having declined to insist on the breach of covenant for the avoiding of the notice, he could be allowed to stand on it as a claim for maintaining an action of covenant. And to put this beyond doubt, a clause might well have been introduced into the lease, that its determination by notice should not prejudice the right to any remedy to which the lessor was then entitled for breach of any of the covenants.

It seems to me that in this way the introduction of the final clause in question may properly be reconciled with the existence of the earlier part of the proviso, construed in the sense that the lease is not to determine by the operation of the notice, if any of the covenants have been broken, and the lessor chooses to avoid the notice on that ground.

This construction does not, as it seems to me, further extend the natural meaning of the language than is done in the familiar instance of a proviso in a lease that it shall be utterly void, to all intents and purposes, for non-payment of rent or other breach of covenant, and with respect to which it has been established by the well-known series of cases commencing with that of *Rede v. Farr* (2), that the true construction is, that the lease is not to be utterly void, but voidable only at the option of the lessor; for that the

(1) 3 R. R. 305 (6 T. R. 665).

(2) 18 R. R. 329 (6 M. & S. 121).

lessee shall not be permitted to take advantage of his own wrong.
See also *Hyde v. Watts* (1).

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In this view of the proviso, I think that effect may be *given to the final clause, consistently with allowing the earlier portion to operate in its natural and obvious sense as a condition precedent; and consequently, that the judgment of the Court of Exchequer Chamber is right.

MR. BARON PLATT:

The solution of the question proposed by your Lordships to her Majesty's Judges in this case depends upon the proper construction of the proviso which has been discussed at the Bar. That proviso had been introduced into the lease for the benefit of the lessees, and provided that if they should be desirous to quit the demised premises at the end of the first eight years of the term, and, of such their desire, should give to the lessor, his heirs or assigns, notice in writing, eighteen calendar months before the expiration of such eight years, then and in such case (all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed), the lease, and every clause and thing therein contained, should, at the expiration of the first eight years, cease, determine, and be utterly void to all intents and purposes, in like manner as if the whole of the term of forty-two years had then run out and expired, but nevertheless without prejudice to any claim or remedy which any of the parties to the lease, or their personal representatives, might then be entitled to, for breach of any of the covenants or agreements therein-before contained. Upon this proviso, the plaintiffs in error contend that, having given to the lessor, eighteen months before the expiration of the first eight years, notice of their desire to quit the demised premises at the end of that period, they thereby limited their tenancy to the first eight years of the term, and they seek on that ground a reversal of the judgment of the Court of Exchequer Chamber. On behalf of the defendant *in error, it is contended that the proviso is not absolute, but conditional; and that, unless at the end of the eight years the rent had been paid, and the covenants on the part of the lessees had been duly observed and performed, the tenancy continued. If, therefore, the words "all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly

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(1) 67 R. R. 332 (12 M. & W. 254).

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observed and performed," as used in the proviso, are to be read as constituting a condition precedent, the defendant in error is entitled to judgment. If they are not to be so read, judgment should be given for the plaintiffs in error. The reservation of the claims and remedies to which any of the parties might, in the event of the determination of the lease by the notice, be entitled, introduced at the close of the proviso, is well calculated to render doubtful the intention of the contracting parties. The former case went off upon a question of pleading; and although the inclination of my mind on the present question was in favour of the present plaintiff in error, yet upon mature consideration of the provisions of the deed, and the arguments adduced on both sides at the Bar of your Lordships' House, I cannot surmount the difficulty presented by the learned counsel for the defendant in error, namely, that if the words are deprived of the function of a condition precedent, they do not effect any purpose whatever; they might have been omitted altogether, or instead of them might be substituted, "although the arrears of rent remained unpaid and the covenants unperformed," without making any difference in the operation of the instrument.

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I do not think that a court of law would be justified in holding that words which, taken in connection with the context immediately precedent and consequent, possess so decisive a signification, were introduced without a corresponding design. Sir JOHN PATTESON appears to me to *have disposed of the reservation of the claims and remedies in delivering the judgment of the Court of Exchequer Chamber. The parties contemplating, as regards the lessor, the possibility of his resumption of possession, without being aware of a breach of covenant committed during the eight years by the lessees, and as regards the lessees, the possibility of their having, at the expiration of the eight years, a right of action against the lessor, may account for its introduction *abundanti cautela*. For these reasons, I think that the words used in the proviso constituted a condition precedent; and I answer the question proposed by your Lordships, that, in my opinion, the defendant in error is entitled to your Lordships' judgment.

MR. JUSTICE WIGHTMAN :

In answer to the question proposed by your Lordships, my opinion is, that upon this record the defendant in error is entitled to judgment. The question has been considered in the Courts

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of Exchequer, Queen's Bench, and Exchequer Chamber, and all have agreed in this, that except for the words at the end of the proviso, "but nevertheless without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, might then be entitled to for breach of any of the covenants or agreements hereinbefore contained," the performance of the covenants would have been a condition precedent to the exercise of the power to determine the lease. But it was considered by the Court of Exchequer, and has been urged by the counsel for the plaintiffs in error, that the words in the previous part of the proviso, which of themselves were unambiguous, and would clearly make the performance of the covenants a condition precedent, were so controlled or explained by the words of the latter part of the proviso, that they would not amount to a condition precedent, or indeed to any condition *at all, and that the case of *Porter v. Shephard* (1), which would otherwise be a direct authority for the defendants in error, was on that account distinguishable.

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It is said, on the part of the plaintiffs in error, that there is an inconsistency in making the exercise of the power to determine the lease depend upon a performance of the covenants, if such exercise of the power is to be without prejudice to any claim or remedy by either party for breach of covenant, as it would be idle and useless to except from the operation of an intermediate determination of the lease any claim or remedy for breach of covenant, if the lease could only be determined in case there had been no breach of covenant; and that by the construction contended for by the defendant in error, no effect whatever is given to the words in the latter part of the proviso, which it is said would be merely useless. It appears to me, however, that the construction contended for by the defendant in error is the true construction, and that by it full effect may be given to every part of the proviso. The lessees alone are to have the benefit of the power of determining the lease, and it may well be that the lessor would annex to that power the condition of having performed the covenants to entitle the lessees to the benefit of it. The consequence might be, that the most trifling breach of covenant would destroy the power; but this does not appear to me unreasonable, or contrary to the intention of the parties. If the lessees found the strict performance of the covenants too onerous, they might relieve themselves at the end of eight years from

(1) 3 R. R. 305 (6 T. R. 665).

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further performance, and the lessor might wish to give the lessees an interest in the strict performance of the covenants by giving them a conditional power to determine the lease only on such performance. The only difficulty arises from *the terms of the clause at the end of the proviso, reserving any claim or remedy the parties may have for breach of covenant. If that clause has the effect contended for by the plaintiffs in error, it would render the words, which are in form words of condition, wholly without object or meaning, though they are perfectly clear and unambiguous, and the condition they apparently introduce is one of great importance to the lessor ; whilst, on the other hand, some effect may be given to the clause at the end of the proviso, if the words in the previous part of it were allowed to have the effect of a condition precedent, which is the only effect they can have, unless rejected as mere unmeaning surplusage. The clause at the end of the proviso may well have been introduced from abundant caution, and to prevent, by express provision, any doubt that might arise as to the remedy of the lessees against the lessor for breach of covenants by them, in case the lessees chose to determine the lease, they having performed all the covenants. That clause would also apply in cases suggested in the judgment in the Exchequer Chamber, in which the lessor had acted upon a notice to determine the lease, and had retaken possession, being ignorant at the time of a breach of covenant by the lessees. It may be observed that, in the covenant for quiet enjoyment, which immediately follows the proviso, the terms used are, " it shall and may be lawful for them (the lessees), well and truly performing all and singular the covenants and agreements on their part to be kept (but not otherwise), peaceably and quietly to occupy, possess," &c. ; whilst in the proviso in question the terms used are, " all and singular the covenants on the part of the lessees having been duly observed and performed ; " the latter terms indicating a condition precedent, which the words used in the covenant for quiet enjoyment, according to the case of *Hays v. Bickerstaffe* (1), *and some other cases, would not amount to. unless the addition of the words " and not otherwise " made them do so. Upon the whole, it appears to me, that by holding the words " all and singular the covenants on the part of the lessees having been duly observed and performed " to amount to a condition precedent, effect is given to every part of the proviso, whilst, by the construction contended for by the

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(1) 2 Mod. 34.

plaintiffs in error, those words, apparently so important, are reduced to mere surplusage, and no effect or meaning whatever is attributed to them. And I therefore think that, upon this record, judgment ought to be given for the defendant in error.

MR. JUSTICE COLERIDGE:

I am of opinion that, on this record, judgment ought to be given for the defendant in error. It is agreed that the question turns upon the proper construction to be given to the proviso for the determination of the lease. It cannot, I think, be disputed, that if these words are to be understood in their plain and obvious meaning, they express most unambiguously the intention of the parties to be, that the lessee shall not have the benefit of determining a forty-two years' lease at the end of the first eight years, and subsequently at the end of any three years, unless he has first paid all arrears of rent, and duly observed and performed all and singular the covenants and agreements on his part to be observed and performed. The condition, thus expressed, I think it reasonable to understand as requiring that the account between the parties must, both as to rent and covenants, be clear; the rent need not have been always paid on the day; but all arrears, if any, must have been paid up; the covenants must have been strictly kept, or, if *broken, must have been satisfied for. So understood, the words import a condition precedent neither impossible nor unreasonable; and where that is clearly the case, the mere difficulty of performance, from the number or nature of the covenants to be performed, —a fact which must have been perfectly within the knowledge of the party contracting,—seems to me a very unsatisfactory reason for holding it to be otherwise. If the number of the covenants or their nature is in this case a sufficient reason, where is the line to be drawn? What number will be sufficient, or what character will be difficult enough, to show that the parties could not have intended a condition precedent? Or, if it should be said that here, at all events, the number or nature passes the line which it may be difficult to define, why did the parties, not intending a condition precedent, use language to which, without regard to these considerations, no other meaning could possibly be given? The supposition is that the lessee, looking at the numerous and difficult engagements he had entered into, could not have intended, and did not intend, to make his power of determining the lease dependent on the punctual fulfilment of them. But how is this to be reconciled

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with the use of language so unambiguously expressing that intention? But then it is said,—and upon this alone reliance was placed in the Court of Exchequer,—a qualification is added at the end of the proviso, which shows that the language preceding must be understood in some modified sense. What that modified sense is, has not been very clearly explained. The qualification is this: “Nevertheless without prejudice,” &c. This, it is said, is only to come into operation when the power to determine the lease has been acted on; but by the hypothesis it can only be acted on if all the covenants have been performed; and then it will be unnecessary. Now, assuming it to be unnecessary, it would seem to me a very insufficient *reason for doing violence to language so plain as that we have been considering; for it is surely not a very uncommon thing to find in leases or other documents provisions introduced, from over-anxiety or caution, which are not strictly necessary. But whether we consider the words in question a condition precedent or not, I apprehend this clause is equally unnecessary. Suppose the lease determinable by notice, though any or all the covenants are broken, and it is so determined, yet it is only determined “in like manner as if the whole of the said term of forty-two years had then run out and expired;” in which case, without this provision, the lessee might still be sued on the lease for any precedent breaches of covenant. But if the saving is unnecessary equally if you read the proviso in a non-natural sense as if you read it in its natural sense, how can its insertion be an argument against reading it in the latter rather than in the former? Looking at the instrument by the light of common sense, it is easy enough to see why the saving was introduced. In framing instruments such as this, neither the principal’s nor their legal advisers consider merely what it may be strictly necessary to stipulate for. In order to secure beyond a doubt the performance of that which is conceded, they insert clauses to which no objection is made, because the substance having been conceded, if they are unnecessary, they at least do the one party no harm, and if they are necessary, the other party has a clear right to the insertion. To build elaborately ingenious arguments, and still more to draw from their insertion inferences, on which important rights are to be decided, seems to me, I own, to be very unsatisfactory and unsafe. For this reason I am not very careful to explain the insertion of this saving; but supposing that it were necessary to insert it, if the lease might be determined by the notice, some covenants having been broken and

the breaches remaining unsatisfied, it seems *to me that even then it would have been reasonable to insert it, although the proviso be construed as a condition precedent, equally in the one case as the other; for parties do not always act on their extreme rights, and they do not always know all the facts which affect their relations with each other. The landlord might suffer the lease to be determined by the notice, although he knew of a covenant broken, or he might acquiesce in the notice in ignorance of a breach. In either case, it would be important for him to have preserved his remedies on the lease for such breaches. The words of the saving, without any alteration, would be proper to preserve those remedies to him.

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My answer, however, to your Lordships' question, does not rest on this explanation, but upon the broad principle of construing language which is unambiguous according to its plain meaning, and ascertaining the intention of parties from the language they use so construed; and I think it of the utmost consequence not to be diverted from that principle in any judicial decision, by the apparent inconvenience or hardships which may follow. It is far better that a known and certain and reasonable rule should bear hard on an individual now and then, who may thank his own incaution, or, it may be, his own dishonesty, for what he suffers, than that the whole public should labour under the intolerable grievance of having no certain rule at all by which their contracts are to be construed. And this last (I say it with great respect for my brethren from whom I differ) seems to me the natural consequence of straining the language of this proviso, so as to make it other than a condition precedent.

MR. BARON PARKE:

To the question proposed by your Lordships, I have to *answer that, in my opinion, judgment ought to be given for the defendants below, the plaintiffs in error.

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In construing the clause on which this case depends, we must adopt the rules of construction now, I believe, fully established,—we must give effect to the words in their ordinary and grammatical sense, and if that leads to any absurdity or repugnance, or inconsistency with the manifest purpose of the parties to the instrument, to be collected from every part of it, the language must be modified so as to avoid such inconvenience, but no further; and effect must be given to all the words used, if it can be done. Adopting these

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rules, I think that the words "all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been duly observed and performed," do not constitute a condition precedent.

It will at once be seen that the performance of all the covenants could not be a condition, for there are some which do not apply until after the end of the term, which it was therefore impossible to perform before; and it is perfectly clear that the language of the proviso must be modified by confining the condition of performance to such as it was the duty of the lessees before that time to perform. But it is possible that the lessees might observe and perform every covenant to be performed before the expiration of the notice, and therefore there is not the same indisputable reason to alter the language of the proviso, as where it is absolutely impossible. The extreme difficulty, however, of performing many of the covenants contained in this lease exactly, coupled with the great importance to the tenant to be able to determine a lease of mines, which is of such a speculative character, and attended with so much risk, renders it highly improbable that the parties could have intended that the power to determine the lease should depend upon the performance by the lessee of every covenant, *especially when some of them are of such a description that no degree of care would certainly secure their performance; such as the covenant to keep the grass lands free from trespass, which is a warranty against trespassers, and the covenant to consume on the premises all the hay, straw, and turnips produced thereon, which, if it should be pressed with extreme strictness, would be broken if every cartload of straw should not be so spent, even though it might have been stolen or destroyed by accident. These are good reasons for supposing that the parties never could have intended to make the exact and due observance of all and every such covenants a condition precedent, either to the right to determine the lease, or to the off-going crop, which is in the same category. If they did so intend, the defendants would of course be bound, just as a lessee is bound who agrees that his lease should be forfeited for any breach of covenant, however trifling. But it is to be observed, that in such a case the lessee does not merely rely on the forbearance of the lessor, in not insisting on each minute breach, but a forfeiture is, by law, waived by every subsequent act, even of the slightest nature, affirming the lease after knowledge of its being forfeited. In the present case no waiver by the lessor of the breach of covenants

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actually broken would put the lessee in the same situation as if they had been performed, according to the terms of the lease; for that would be to vary, by parol, the stipulations of an instrument under seal, which cannot be done. The acceptance of an agreed satisfaction by parol would discharge a covenantor from damages for the breach of covenants, or might be evidence of a new contract, on the terms of the deed, as explained in the case of *Heard v. Wadham* (1), by Lord KENYON and Mr. Justice LAWRENCE, but the stipulation of a deed cannot be varied without deed.

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If, however, there were no expressions in this lease to qualify or explain the meaning of the words "all and singular the covenants and agreements on the part of the lessee having been duly performed," it would be difficult to avoid giving them full effect as a condition precedent, and the case of *Porter v. Shephard* (2) could not be satisfactorily distinguished from the present. The words there were certainly stronger, "from and after payment of rent and performance of covenants" being clearer words of condition; and the covenants, too, in that case were not so numerous or so difficult to perform as in this lease; but still I think, that unless there had been some qualifying words, the case would have called upon us to decide in conformity with it.

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But there are very important words which follow, and which, I think, cannot be reasonably explained, and have effect given to them according to their ordinary meaning, without holding that the words "all and singular the covenants and agreements," &c. do not constitute a condition precedent. These words follow: "nevertheless without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." These words, according to their ordinary construction, clearly show that, after the end of the lease by the notice, breaches of covenant might still exist, on which the lessee might have to sue, and consequently that the parties never could have intended that the performance of every covenant should be a condition precedent, for if that had been the meaning, the reservation of the right to sue on the broken covenant would be absurd, as the lease could not have determined at all.

A very intelligible and consistent meaning may be given to the whole sentence without doing violence to the words. *The effect would be this: If eighteen calendar months' notice in writing should

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(1) 1 East, 630.

(2) 3 R. R. 305 (6 T. R. 665).

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be given, expiring at the end of the eighth year, then, if the arrears of rent are paid, and all the covenants have been observed, the lease, and every clause and thing therein contained, shall, at the expiration of the eighth year, cease and determine, and be utterly void to all intents and purposes; the lease shall become as waste paper and useless; but if covenants are broken on either side, the remedy in the other shall still continue, and the lease not cease and be void in respect of the remedy for those breaches, though it shall for other purposes. It is true that the clause provides that "it shall be void in like manner as if the whole of the years of the term had run out and expired," and if that only had been the case, the lease would not be altogether void and like waste paper.

But these words may be construed, not to limit the preceding declaration that the lease shall be utterly void, but to explain that such termination of the lease shall also be on the same footing as the expiration of the term by efflux of time, as to the many covenants depending upon the end or determination of the term contained in the lease. This construction makes all the provisions consistent; but if this construction is not adopted, the clause must be expunged,—or the language of this clause must be materially altered, in order to make it consistent with the supposition that the words, before so often quoted, constituted a condition precedent.

It is said by Mr. Justice PATTESON, in delivering the judgment of the Court of Exchequer Chamber, that the additional clause may be consistently explained in three ways. All of these require the addition or the striking out of words.

[*616] First. It is said they may have been inserted to enable the lessor to recover for breaches not known at the end of *the term; but the clause reserves the right to remedies for any of the covenants without any such limitation. To confine it to "the undiscovered breaches" would be to add words; so would it be to confine it to remedies by re-entry or distress, for the clause is not to prejudice any claim of remedy; nor if the rent had been all paid, and the covenants all performed, could there be any right to re-enter or distrain.

Secondly. It is said that the clause would apply if the lessor had waived the condition precedent by accepting notice and taking possession, though he might be aware of some breaches of covenant; but that would require an addition of words to limit the remedy to such previous breaches of covenant, whereas, as the

clause stands, it is given as to all. Nor, for the reason before assigned, could the lessor waive, by accepting and taking possession, the performance of the condition precedent; a deed would be necessary for that purpose; and after such waiver and taking possession, the lease would still continue, if the performance of the covenant was a condition precedent, and the covenant had not been performed. To give complete effect to this construction it would be necessary to add, after the words "all the covenants being duly performed," some such additional words as "unless the lessor shall think fit to waive or excuse such performance."

In the third place, it is said the stipulation may have been introduced to preserve the right of the lessee to sue on the lessor's covenants. To that the answer was not satisfactory, that it was confined to the covenants "thereinbefore contained," and that there was none on the part of the lessor, for it appears that there was one covenant in a prior part of the deed by the lessor. But this explanation cannot be adopted without altering the words of the clause, and confining it to the covenants of the lessor, whereas the words *are general, reserving the remedies to both parties and their representatives.

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Therefore, to adopt the construction put by the Court of Exchequer Chamber on the latter part of the clause, and to make sense of it, would require considerable alteration of the language, and that for the purpose of construing this to be a condition precedent, which would render the valuable right of determining a speculative lease practically inoperative; for though the covenants could by possibility be performed, practically speaking they never could be.

It is true that the construction which I think should be put upon the clause deprives the lessor of the additional security for the performance of the covenants which he would have in the continuance of a long lease, which the lessee could not get rid of without their performance, but still he would have his remedy against the lessee for all those breaches, if the lessee was solvent, and if he was insolvent, the continuance of the term would not be of any advantage.

Construing this instrument according to the ordinary rules, I confess I think it clear that the meaning of the clause in question was, that the payment of arrears and performance of covenants should not be a condition precedent, and consequently, that judgment should be for the defendants below.

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THE LORD CHANCELLOR having fully stated the nature of the action, the pleadings, the judgment of the Court of Exchequer, and the judgment of the COURT which had reversed it, and which was now itself the subject of this writ of error, proceeded thus :

[*618] My Lords, from that judgment a writ of error has been brought to your Lordships' House, and it being purely a legal question, your Lordships called in the assistance *of the Judges. Eleven Judges attended, and of those eleven Judges, eight were of opinion that the Court of Exchequer Chamber was right, and three thought that the original judgment of the Court of Exchequer was right. The great majority was therefore in favour of the judgment which had been pronounced by the Exchequer Chamber, and which is now brought before your Lordships' House for your determination.

[*619] The question turns upon the single point, whether there being a proviso enabling the tenant to determine the lease, the actual performance of all the covenants is a condition precedent to the right to determine the lease. My Lords, at the time the case was brought before the Court of Exchequer, I had the honour to sit as one of the Judges of that Court, and I of course took an interest in the judgment. The ground on which the Court of Exchequer came to the conclusion that the performance of all the covenants was not a condition precedent, was this. The lease contains an infinity of covenants of the most minute description. Amongst others there is a covenant that the tenants "will at all times, from and after the harvest next preceding the expiration or sooner determination of the said term, drain and keep uneaten, and free from trespass, all the land on which grass seeds shall have been sown." Now that is but a specimen of a great many other covenants which it is almost impossible that a party could certainly perform, it being a covenant absolutely out of the power of the party to insure its performance; because it would be a breach of that covenant if, in the night before the determination of the lease, some person had maliciously turned his cattle upon the land. If that was done, the tenant would not then have kept it free from trespass. And inasmuch as there certainly must have been some meaning intended to be given to the power of determining *the lease by notice, and inasmuch as it was morally and physically impossible, or at least practically impossible, that the tenant could literally perform all the covenants, the Court of Exchequer came to the conclusion that this could not have been intended to be a condition precedent, that if the covenants were broken the

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parties were liable upon them; but that the power of determining the lease could not be made to depend upon the performance of something which it was impossible the tenants should in truth perform. That was the ground upon which the Court of Exchequer came to the conclusion that the performance of all the covenants was not a condition precedent; on the other hand, the Court of Exchequer Chamber, before which it came upon a writ of error, thought that the strict terms of the lease ought to be attended to, that this was a contract made between landlord and tenant, and that the landlord ought not to be bound to let his tenant free unless under circumstances coming literally within the terms upon which he had stipulated that the tenant should be able to withdraw from his tenancy, it being one of the terms of that stipulation that the tenant should not withdraw unless all the arrears of rent had been paid, and all the covenants and agreements had been duly observed and performed. The argument was that there was no absurdity in such a contract, that parties might make their own terms, that there was no ambiguity in the language, consequently that the language must be strictly adhered to, and that, therefore, unless the tenant had literally performed every covenant, he had no power of putting an end to the lease.

The main reliance in the Court of Exchequer Chamber, in point of authority (the point being extremely simple, as I have already stated), was upon a case which had been decided, some half century ago, before the Court of King's *Bench, when it was presided over by Lord Kenyon. It is the case of *Porter v. Shephard* (1), which was a writ of error to that Court from the Court of Common Pleas; and there very much the same sort of proviso was contained in the lease as that which gave rise to this case. It was an action of covenant for non-payment of rent for three years and a quarter, due at Lady Day, 1795, on an indenture of demise dated in 1791. The defendant in his plea craved *oyer* of the deed, in which there were covenants by the defendants to repair, "to preserve fruit trees," and so on. There was then this proviso, "That in case the plaintiff in error, his executors, &c., should be minded at the end of the first three or five years of the term to quit and yield up the premises, and of such his or their mind should give notice in writing six months before the expiration of the said first three or five years, then and in such case, from and after the expiration of the said first three or five years, and payment of all rent, and arrears of rent, and

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(1) 3 R. R. 305 (6 T. R. 665).

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duties on the tenant's part to be paid, and performance of the covenants contained on the part of the lessee until the expiration of the said first three or five years, the indenture, and every clause therein, should cease and be utterly void." In that case the Court of King's Bench held that the strict performance of all these covenants, however numerous, however onerous, and however difficult, not to say impossible, it might be to perform them all, was a condition precedent to the tenant's right to determine the lease. And the Judges of the Court of Exchequer, I may venture to say, having been a member of the Court at the time, if they had thought that the present case was undistinguishable from the case of *Porter v. Shephard*, would have most unquestionably felt themselves bound by that authority, however *little they might have been satisfied of the accuracy of the reasoning. But, my Lords, there appeared to the Court of Exchequer to be a very great distinction in this case, arising from this circumstance, that although the language is the same, or very nearly the same, up to the point at which it is stated that all arrears of rent being paid, and all the covenants being performed, the lease shall expire, words are found here which are not to be found in the case of *Porter v. Shephard*, "and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed, this lease, and every clause and thing herein contained shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year (whichever in the said notice shall be expressed) cease, determine, and be utterly void ; " and then come these important words, " but, nevertheless, without prejudice to any claim or remedy which any of the parties hereto, or their respective representatives, may then be entitled to for breach of any of the covenants hereinbefore contained." It appeared to the Court of Exchequer that, even assuming *Porter v. Shephard* to be good law, this case could not be governed by that, and for this reason. It was impossible (so the Court of Exchequer thought) to consider that the actual performance of every covenant, some of them of an extremely petty sort, and some, as I have shown your Lordships, being impossible of literal performance, could have been a condition precedent to the determination of the lease, that is, a *sine qua non*, without which the lease could not be determined ; because, if it were so, what is the meaning of adding that it is to be utterly without prejudice to any claim or remedy to which the parties may be entitled by the breach of any covenants ? It seemed necessarily (so the Judges of the Court of Exchequer

thought) to contemplate the case of a determination of *a lease, though there might be breaches of the covenants with respect to which the parties should be entitled to sue. That view of the case was, however, not held by the Court of Exchequer Chamber, and it is now for your Lordships to decide which view you will adopt, whether that of the Court of Exchequer or that of the Court of Exchequer Chamber.

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My Lords, if this matter were to have been decided by myself, I confess I should have been very much inclined to adhere to the opinion which was formed by the Court of Exchequer. I confess I think, in my own mere private judgment, that that opinion was right; and I should have continued to think so, but for a very high authority to which I am about to advert, and which leads me to think that I could not safely advise your Lordships to act upon my opinion. Perhaps it may be that, having been myself a party to that judgment, I may feel an undue bias in its favour. I think, however, I know myself well enough to be sure that that does not influence me. I formed that opinion then, and I am strongly inclined still to entertain it. But in a question of pure law of this sort, though undoubtedly your Lordships are not bound by the opinion given by the learned Judges, yet, when there was so large a majority of them, eight thinking that *Porter v. Shephard* was rightly decided, and that it governs this case, and only three adopting the view which was taken by the Court of Exchequer, I should have been extremely loath to let my own judgment unduly influence your Lordships. And I am bound to say beyond this, that my noble and learned friend, who is not now present, but is absent in consequence of ill-health,—my Lord BROUGHAM,—having heard the whole of this case, has communicated to me his conviction that *Porter v. Shephard* does govern this case, and that the opinion of the majority of the Judges is the correct opinion and the right view of the case. He was not able to attend *in his place to express that opinion, but I promised to do so for him. The case, therefore, stands thus,—that there was a unanimous judgment in favour of the original plaintiff in the Court of Exchequer Chamber (the defendant in error here), and eight Judges to three now think that that judgment was right. And if my noble and learned friend were here in his place, and I, acting upon my own judgment, were to move your Lordships to reverse the judgment of the Court of Exchequer Chamber, that could not be done, because, supposing no other noble Lord to take any part in the case excepting those who

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heard it, and I was, as strongly as I could, to move your Lordships to reverse the judgment of the Court of Exchequer Chamber, there would be one noble Lord only for reversing, and the other for affirming. Now it is well known that a judgment cannot be reversed, unless a majority of the noble Lords who have heard the case shall come to the conclusion that it ought to be reversed. If they are equally divided, the judgment stands as it was pronounced in the Court below. Therefore, though I do not disguise from your Lordships that I still entertain a very strong conviction that the original judgment was right, and that the judgment of the Court of Exchequer Chamber was not right (or at least I should have very strongly entertained that conviction, had it not been for the very great preponderance of authority the other way), I shall therefore feel it my duty to move your Lordships that the judgment of the Court below be affirmed.

Judgment of Exchequer Chamber affirmed, with costs.

EMMENS v. ELDERTON (1).

1852
Feb. 17, 19.

(4 H. L. C. 624—678; S. C. 13 C. B. 495; 18 Jur. 21; affg. 6 C. B. 160.)

Lord
TRURO, L.C.
Lord
BROUGHAM.

1853.
April 28.
Aug. 12.

Lord
TRURO.
MARTIN, B.
PLATT, B.
PARKE, B.
TALFOURD, J.
WIGHTMAN,
J.
EBLE, J.
COLERIDGE,
J.
MAULE, J.
CROMPTON, J.
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A count in a declaration in assumpsit set forth an agreement between an attorney and solicitor and a Company, that "from January then next, the plaintiff, as the attorney and solicitor of the Company, should receive a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business transacted by him for the Company as such attorney and solicitor; and should for such salary advise and act for the Company on all occasions in all matters connected with the Company" (the prosecuting and defending of suits, preparing bonds, and some other matters, for which he was to be allowed the regular charges, being excepted), "and that he should attend the secretary and the board of directors when required." The count then alleged, "That in consideration that the plaintiff had, at the request of the Company, promised the Company to perform his part of the agreement, the Company promised the plaintiff to perform their part, and to retain and employ him as such attorney and solicitor of the said Company, on the terms aforesaid." The count then alleged for breach, that "though for a small space of time the Company did retain and employ the plaintiff as such attorney and solicitor on the terms aforesaid, and did pay him a small part of the salary, and though he was always ready and willing to advise and act for the Company, and to accept the salary on the terms aforesaid, and in all other respects to fulfil the agreement on his part, yet the Company disregarding, &c., did not, nor would, continue to retain or employ the plaintiff as such attorney or solicitor on the terms

(1) Referred to, *Whittle v. Frankland* (1862) 2 B. & S. 49, 31 L. J. M. C. 81; *Churchward v. Reg.* (1865) L. R. 1 Q. B. 173, 207, 6 B. & S. 808; *Frost*

v. Knight (1870) L. R. 5 Ex. 322, 329, 29 L. J. Ex. 277, 23 L. T. 714; *Turner v. Sawdon* [1901] 2 K. B. 653, 70 L. J. K. B. 897, 85 L. T. 222.

aforesaid, but, on the contrary," in May, "wrongfully dismissed and discharged the plaintiff from such employment and retainer, and then and from thence hitherto have wholly refused to retain or employ him as such attorney and solicitor of the said Company, and to pay him the salary as aforesaid, by reason of which last-mentioned premises the plaintiff has wholly lost and been deprived of the salary, and also of divers great gains and profits which he might and otherwise would have derived from such employment in and about the prosecuting and *defending of suits and preparing of bonds, &c." After a verdict for the plaintiff, with 200*l.* damages :

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Held, that the count did sufficiently allege a consideration for the promise to retain and employ the plaintiff as attorney and solicitor, and that the consideration was not exhausted by the promise on the part of the Company to perform the agreement.

THIS was an action of assumpsit brought in the Court of Common Pleas by Elderton, an attorney, against Emmens, who was sued as representing the Church of England Life and Fire Assurance Trust and Annuity Company.

The declaration was delivered on the 17th day of January, 1846. It contained four counts. The second alone is material for consideration in this writ of error. That count is as follows :

"And whereas also afterwards, to wit, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and forty-four, it was agreed, by and between the plaintiff and the said Company, that from the first day of January then next, the plaintiff, as the attorney and solicitor of the said Company, should receive and accept a salary of one hundred pounds per annum, in lieu of rendering an annual bill of costs for general business transacted by the plaintiff for the said Company as such attorney and solicitor, and should and would, for such salary of one hundred pounds per annum, advise and act for the said Company on all occasions in all matters connected with the said Company (the prosecuting or defending of suits, the preparation of bonds or other securities for advances by the said Company, and moneys disbursed by the plaintiff being excepted, and the plaintiff being allowed in respect of such matters to make the usual charges of an attorney and solicitor); and that the plaintiff should attend the secretary of the said Company, as well as the board of directors *thereof, and the meetings of the proprietors thereof, when required. And the said agreement being so made, afterwards, to wit, on the said thirtieth day of November, in the year aforesaid, in consideration that the plaintiff had, at the request of the said Company, promised the said Company to perform and fulfil the same in all things on his part, the said Company promised

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the plaintiff to perform and fulfil the same in all things on their part, and to retain and employ him as such attorney and solicitor of the said Company, on the terms aforesaid. And although the said Company did, for a certain small space of time thereafter, to wit, for the space of four months, in pursuance and fulfilment of the said agreement and of their promise in that behalf, retain and employ the plaintiff as such attorney and solicitor on the terms aforesaid, and did pay him a small part of the said salary, to wit, fifty pounds, and although the plaintiff was at all times, from the making of the said agreement hitherto, ready and willing to advise and act for the said Company, and accept the said salary on the terms aforesaid, and in all other respects to fulfil the said agreement on his part, of which the said Company always had notice, yet the said Company, disregarding their said agreement and their promise, did not nor would continue to retain or employ the plaintiff as such attorney or solicitor of the said Company on the terms aforesaid, but, on the contrary thereof, afterwards and before the commencement of this suit, to wit, on the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and forty-five, wrongfully and without any reasonable cause, dismissed and discharged the plaintiff from such employment and retainer, and then and from thence hitherto have wholly refused to retain or employ him as such attorney and solicitor of the said Company, or to pay him the salary aforesaid, by reason of which last-mentioned premises the *plaintiff has wholly lost and been deprived entirely of the said salary of one hundred pounds, and also of divers great gains and profits which he might and otherwise would have derived from such employment, in and about the prosecuting and defending of divers suits respectively brought by and against the said Company, and in and about the preparing of divers bonds, contracts, and securities for the said Company and otherwise, to wit, to the amount of five thousand pounds, and has been and is in other respects greatly injured and damnified."

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The defendant pleaded four pleas, and the cause came on to be tried before Mr. Justice Cresswell, at the sittings after Trinity Term, 1846, when a verdict was found for the plaintiff on the second count of the declaration, with two hundred pounds damages. The verdict on the first count was, upon motion in Term, ordered to be entered for the defendant.

A rule was granted to arrest the judgment on the second count,

and was made absolute in Trinity Term, 1847 (1). On the judgment then given, the plaintiff brought a writ of error in the Exchequer Chamber, and the case came on for argument in the Exchequer Chamber on the 30th November, 1847, before Barons Parke, Alderson, and Rolfe, and Justices Wightman, Erle, and Baron Platt, and judgment was given by the Court of Exchequer Chamber on the 15th of May, 1848, reversing the judgment of the Court of Common Pleas (2). The present writ of error was then brought. The Judges were summoned, and Mr. Baron Parke, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Talfourd, Mr. Baron Platt, Mr. Baron Martin, and Mr. Justice Crompton attended.

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Mr. H. Hill and Mr. Willes for the plaintiff in error :

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The second count is not sufficient in law. * * The agreement did not constitute the relation of attorney and client between these parties, but amounted merely to this, that if the Company wanted the assistance of the plaintiff as an attorney he might be employed, and the plaintiff undertook to accept such employment if it was offered him. * * Even the Court of Exchequer Chamber admitted that the Company was not bound to supply the plaintiff with business, but nevertheless that Court held that it was or might be the duty of the Company to retain and employ the plaintiff in the sense of keeping up with him the relation of attorney and client, and that the declaration must be taken to have alleged a breach of the promise by the Company in May, 1845. That was erroneous. No such duty is shown on the face of the count. But even if such a duty had been shown, no sufficient breach of it is alleged. The count sets forth that the Company would not continue to retain and employ the plaintiff, but does not go on to allege that the Company had work on which to employ him. There is, therefore, no sufficient allegation of a breach of the agreement, even as that agreement is supposed to be set forth in this count. In *Ripley v. McClure* (3), the refusal to receive a cargo, made before the time at which the cargo had actually arrived and could be tendered for acceptance, was held not to be a breach of the contract to accept the cargo on its arrival. * * In the judgment in the Exchequer Chamber, reliance was placed on the meaning given

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(1) 4 C. B. 479.

(3) 80 R. R. 593 (4 Ex. 345).

(2) 6 C. B. 160.

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in Johnson's Dictionary to the word "retain." It is there said that to retain means "to keep in pay," or "to hire," and on that meaning the Court held that the word "implied a promise to retain," and therefore that it created the relation of attorney and client.

(THE LORD CHANCELLOR (LORD TRURO): Johnson, perhaps, did not know that an attorney might be changed in the course of a cause; that he might be "retained" for that cause, and yet need not be employed throughout its course.)

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The Court of Exchequer Chamber expressed an opinion on the construction of the contract, which assumed that the plaintiff would not be entitled to his salary unless he actually served for the year (1), and therefore seems to have assumed that he was entitled to damages, because he was told in May that no services would be required from him. But *that is clearly incorrect. To disable him from recovering his salary for the year, he must not only be incapable of serving, but the incapacity must arise from himself. * * There is no doubt that the Company was bound to pay the salary for the year, and that the non-payment of it at the end of the year would constitute a good cause of action. This count is bad, because it adds another cause of action, namely, for damages in respect of a possible loss through not having been actually employed. The agreement did not expressly promise to give business to Elderton, and if, as is the case here, the promise is founded on an executed consideration, no such promise can be implied in law. The Company may have no business to give him, and is not bound to create business for him, though the construction put by the Exchequer Chamber on "retain and employ" seems to imply the reverse.

(THE LORD CHANCELLOR: You object that there may be such a promise as is stated in the declaration, and yet that that is not a good foundation for what is afterwards erected upon it.)

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That is so. * Here is an allegation of special damage, which cannot properly be referred to the promise nor to the alleged breach of it. Even if treated as surplusage, it explains the sense of other averments in the same count, and shows that a promise is thus engrafted on the agreement which the law will not imply from that agreement. As that cannot be done, the count is bad in that respect. The cases

of *Aspdin v. Austin* (1) and *Dunn v. Sayles* (2) are decisive of the present. * * *

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Mr. Hoggins and Mr. Cowling, for the defendant in error :

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The second count shows a hiring for a year, at the salary of 100*l.*, and the promise there laid is one which is to be inferred by law from that hiring, and the agreement, as there set forth, establishes clearly the existence of the relation of attorney and client between these parties. * * Under that agreement he was bound to go on for the current year, and the Company was bound to employ him for that time: *Fawcett v. Cash* (3); and a dismissal before that time amounted to a breach of the agreement. * * The dismissal here prevented him from being in a condition to earn the salary of 100*l.*, and that dismissal gave him an immediate right of action.

Leaving the mutual promises out of the question, what is the meaning of this agreement? The terms are, to “retain and employ.” They must mean a regular hiring, a keeping in employment. No particular form of words is necessary for that purpose. *Beeston v. Collier* (4). * * *

All the law, as stated in *Viner*, is well discussed in a note to *Pordage v. Cole* (5). Almost all the old cases depend on the nice distinction whether the covenant is a dependent or an independent covenant. * * *

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The agreement here imports a promise to employ: *Mountford v. Horton* (6); and the declaration does not give the words a meaning which the law will not imply. * * Here the agreement in substance is set out, and the law will imply the promise alleged. To retain and employ an attorney does not of course mean to enter into litigation every day for his benefit, any more than to retain and employ a surgeon would mean to give him occupation every day; but it does mean to give him the work if and whenever it shall arise, and a refusal ever to give him such work, though made before the work arises, is a breach of the agreement. The cases of *Aspdin v. Austin* (1) and *Dunn v. Sayles* (2) are not in point, for they were decided on the particular words to be found in the agreements and the particular circumstances of the case. * * *

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(LORD BROUGHAM: The count here carries double; it first states

(1) 5 Q. B. 671.

(4) 4 Bing. 309.

(2) 5 Q. B. 685.

(5) 1 Wms. Saund. 319.

(3) 39 R. R. 709 (5 B. & Ad. 904).

(6) 2 Bos. & P. 62.

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an agreement without stating a consideration, and then a general retainer, and then a promise as made in consideration of the agreement.)

[*635] The allegation that special damage did accrue to the *plaintiff is immaterial. That damage follows as of course upon the breach of the agreement to retain and employ. * * *

It is not disputed that where an executed consideration ends in a specific promise, no other can be alleged but what the law implies; but there are other cases where only part of the consideration is executed, as by the sale and delivery of goods, yet the liability on the subsequent promise cannot be denied. * * If this count had stated the agreement as made at the request of the defendant, who thereby became liable to perform the same, and being so liable, had made the promise, it must be admitted that that promise could only have been treated as a promise to perform the agreement: *Hopkins v. Logan* (1). But nothing of that kind is alleged here. This case more resembles that which is supposed in the judgment in *Kaye v. Dutton*, where it is said by Lord Chief Justice TINDAL (2): "Two objections were made to the declaration: first, that it did not show any consideration for the promise by the defendant; secondly, that the promise was laid in respect of an executed consideration, but was not such *a promise as would have been implied by law from that consideration; and that, in point of law, an executed consideration will support no promise, although expressed, otherwise than that which the law itself would have implied. The cases cited by the defendant, *Brown v. Crump* (3), *Granger v. Collins* (4), *Hopkins v. Logan* (1), *Jackson v. Cobbin* (5), and *Roscorla v. Thomas* (6), certainly support that proposition to this extent,—that where the consideration is one from which a promise is by law implied, there no express promise made in respect of that consideration after it has been executed, differing from that which by law would be implied, can be enforced. But those cases may have proceeded on the principle that the consideration was exhausted by the promise implied by law, from the very execution of it; and consequently, any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it." * * *

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Here the consideration is not wholly, but only in part, executed,

(1) 52 R. R. 704 (5 M. & W. 241).

(2) 66 R. R. 795 (7 Man. & G. 815).

(3) 6 Taunt. 300.

(4) 55 R. R. 687 (6 M. & W. 458).

(5) 58 R. R. 869 (8 M. & W. 790).

(6) 61 R. R. 216 (3 Q. B. 234).

and the breach of not paying according to the promise is properly alleged. * * *

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In Comyn's Digest (1) it is said : " An assumpsit lies, though the consideration be executed in part, as in consideration that he had done a thing at my request." In many of these cases there is no promise which the law would necessarily imply from the agreement : *Bainbridge v. Firmstone* (2).

(THE LORD CHANCELLOR : That was a promise made at the time, as the consideration for the plaintiff allowing the defendant to have the boilers.)

Here there is an actual engagement to retain and employ the plaintiff for a year ; but if not read as so set out in substance, then it must be taken that the words are set out exactly, and that the sum was agreed upon, and mutual promises made, and that the breach is consistent with those promises ; and lastly, this is an independent promise, however it may be expressed ; and this promise itself goes beyond what would be implied in law from the agreement, and has been properly declared on as an independent promise, the breach of which, as here alleged, gave a good legal right of action.

Mr. Wiles, in reply. * * *

THE LORD CHANCELLOR :

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The question in this case is in some measure one of pleading ; but beyond that it involves a point of law of general importance. The question I propose to put to the Judges is this : " Would a plaintiff in the courts of law be entitled, after verdict, to a judgment upon a count in the form of the second count set out in this record ? "

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The Judges requested time to consider the question.

Ordered accordingly.

MR. JUSTICE CROMPTON, having stated the pleadings, said :

1853.
April 28.
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The question in this case is whether the second count of the declaration is good after verdict. The Court of Common Pleas arrested the judgment upon this count after verdict, on the ground that the promise to retain and employ was not to be implied from the agreement ; and that the consideration, being an executed one, would not support such promise.

(1) Com. Dig. Act on case assump-
sit, B. 12.

(2) 53 R. R. 234 (8 Ad. & El. 743).

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It must, since the decisions referred to in the argument on this point, be considered as settled law that a count of this nature is bad, if the promise is more extensive than the promise which is implied by law as arising from the past consideration. According to this rule, the count will be bad if the promise to retain and employ the plaintiff below, as such attorney, on the terms aforesaid, at all enlarges the general promise to perform the agreement. If the agreement itself contains this same promise to retain and employ as such attorney on the terms aforesaid, then these words, being surplusage, will not prejudice the count, and must be taken as merely pointing the promise to the breach afterwards assigned for ceasing to retain and employ. If, on the other hand, the words in question at all enlarge the previous agreement, by binding the Company to retain the plaintiff in any manner in which the agreement did not bind them, as by binding the Company to find him any particular work, or to keep him in work, or to employ him in any of the business which he was not to do for the 100*l.* per annum, *or to continue him in the employment for any time for which they were not bound by the agreement, the count will be bad, for want of a consideration to support this additional promise.

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On reading the agreement, I concur entirely with the judgment of the Exchequer Chamber, as to the Company being bound to continue the relation of employers and employed, at least for a year. The argument of the counsel for the defendant in error, satisfied me that the engagement under the contract, in the words of both parties, for a gross sum to be paid at the end of a year, in lieu of an annual bill of costs, cannot have been intended to continue for less than a year. The contract is for the sum of 100*l.* per annum, and not for payment at that rate; and I cannot think that the parties intended merely to substitute one mode or rate of payment for another, leaving it optional to the employers to put an end to the engagement at their pleasure. The plaintiff may have been induced to forego the usual charges of an attorney, from considering that he was to be paid for the whole year's work; and that, taking the rough and the smooth together, the 100*l.* would satisfy him; and the defendants probably preferred paying the certain sum for a certain time to being subject to the uncertainty of the amount of the charges. It would be quite inconsistent with these views that there should be a power of terminating the engagement, and paying the plaintiff for the services, either according

to the scale of attorneys' charges, or *pro rata* in proportion to the work done, or the time during which he continued to serve.

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Supposing the case one of employment and service, the words of the contract appear to me as strong in favour of the engagement lasting during the year, as the words in *Fawcett v. Cash* (1), where an engagement to pay at the *rate of 12*l.* 10*s.* per month for the first year, and to advance 10*l.* per annum until the salary was 180*l.*, was held to bind the employer to employ the plaintiff for one whole year. The agreement seems to me to be clearly a contract of hiring and service. It is specified what the party is to do, and what he is not to do, for the 100*l.*, which he is to receive at the end of the year. Surely this is an agreement, on the one hand, to hire for the particular service, at a given salary, for a year at least, and, on the other, to serve in the specified matters on those terms. Then are the words "retain and employ" to be construed as meaning anything more than is to be found in the agreement itself? I am of opinion that they must be construed (especially after verdict) as correctly describing the effect of the preceding agreement, and as flowing out of, and really arising from and implied by it. And I think that if the declaration, after stating the plaintiff's part of the agreement as the consideration, had, without mutual promises, merely stated a promise by the Company to retain and employ the plaintiff as such attorney, on the terms aforesaid, it would have been proved by production of the agreement. The words "on the terms aforesaid" seem to me to limit the retainer and employment to what has preceded; and the effect of the allegation seems to be, that the Company engages to retain and employ the plaintiff according to the agreement, and no further.

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The principal question has been raised as to the word "employ," and it has been argued that this word must be taken to mean that actual employment was to be found from time to time for the plaintiff. I think, however, that the words "retain and employ," as used in the present case, are a mere amplification of the preceding contract of hiring and service. These words are used in the precedents continually as meaning a hiring, engaging, and keeping a *person in a service, and do not necessarily imply that the master is bound to supply the servant with any particular work whilst the relation subsists. In *Fawcett v. Cash* (1), when Mr. Justice Taunton said that the defendant was bound to retain and

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(1) 39 R. R. 709 (5 B. & Ad. 904).

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employ the plaintiff for the whole year, he surely did not mean more than that the relation of master and servant was to subsist during the year; and he could not be supposed to mean that the master was to be bound to supply the warehouseman with work during the year. The words "retain and employ" may, I think, be used, either popularly or legally, in the sense in which the Exchequer Chamber has construed them; and, if at all capable of such a construction, they are to be taken after verdict in the sense which will support the declaration. It has been suggested that the words "retain and employ," as used in the second count, would be merely inoperative, if used in the sense in which they were construed in the Exchequer Chamber, and that to give them any operation they ought to be construed as meaning that the party was to be actually employed. Since the new rules prevented the old method of declaring in one count on the agreement as set out with mutual promises, and in another on the legal effect of the agreement, it has not been unusual for pleaders to add to the promise to perform the agreement a promise to do some particular matter which they suppose to be the legal effect of, or to be contained in it, and on which they subsequently assign a breach. This is a very dangerous mode of pleading, and is generally useless, as, if the promise be really contained in the agreement, it is unnecessary, and if not so contained, it may make the count bad. But it has been often used in practice, probably for the purpose of applying the breach *more pointedly to the promise; and I do not think that the adoption of such a mode of pleading can be fairly treated, as showing that the pleader used the words in question in a sense which would make the promise larger than the agreement, and so make the count bad. It was said also that the special damage laid for the loss of profit arising from the loss of the employment, showed the sense in which the word "employment" had been used in the earlier part of the count. The real breach, however, is well and properly assigned for a dismissal from the situation, and is more applicable to such a dismissal, or putting an end to the relation between the parties, than to any refusal to find employment for the plaintiff. And it is the promise and the real breach to which we are to look in order to see whether the action is maintainable, the special damage being no essential part of the count, not being traversable, and, if bad, not vitiating the other part of the count. It is usual to include in the special damage every possible claim, however unlikely to be supported, on the ground

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that, if bad, it can do no harm, and that it may possibly prevent the plaintiff from being excluded at the trial from giving evidence of particular damage, of which the defendant may not have had sufficient notice from the real breach by reason of its generality. It does not appear safe to refer to matter which is no essential part of the count, and which may be stated in the loosest manner without affecting the count, for the purpose of giving to the promise and breach, if otherwise good, and especially after verdict, a sense which would make them bad.

It was further contended in the argument, that there is a distinction between the cases, where there is the relation of attorney and client, and that of ordinary master and servant. And it was said that, in the case of domestic servants, there are collateral advantages for the loss of *which an action for damages would lie; and that in such case there is really a contract to keep in employment, in addition to what is said to be the only contract in cases like the present, to pay at the end of the year. I think, however, that this distinction is not tenable; and that, wherever there is a contract for hiring or employment on the one part, and service for wages or salary on the other, for a specified time, there is an engagement on the part of the employer to keep the employed in the relation in question during that time, and not merely to pay him the wages for the services at the end, and that, in none of these cases, does the obligation to keep retained and employed necessarily import an obligation on the part of the master to supply work. The warehouseman in *Fawcett v. Cush*, and the clerks and servants in the ordinary cases, could make no complaint if the master employed other persons, and there was no work for them, any more than the plaintiff in the present case could have complained if the defendants had given work to other attorneys, or had none to give to the plaintiff. It is said, however, that the only remedy in such cases is to wait till the end of the year, and sue for the wages or salary as a sum certain, averring that the plaintiff was ready all the time to perform, but that the defendant dispensed therewith. *Fewings v. Tisdal* (1), which was cited as showing the contrary, is distinguishable, as in that case the declaration was in *indebitatus assumpsit* in the common form for work actually performed, and that decision is not necessarily inconsistent with a right to bring an action of debt for the sum certain, averring a continual readiness to the end, and a dispensation. Such a doctrine, however,

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would be liable to many of the inconveniences pointed out by the judgment in the Exchequer Chamber; *and it would be much to be lamented if a servant, or agent, or clerk, who was dismissed, should be able to say, "I could easily get another situation, as good or better, but I will not do so, and instead of claiming the real damage I have sustained by the inconvenience and temporary loss of situation, I will bring an action for every instalment of salary till the contemplated period has elapsed." It is not, however, necessary in the present case for your Lordships to decide whether such an action could be maintained. There may be some contracts for payments, as by way of annuities for life or years, where, by reason of express stipulation, the payment may become due from time to time, until some default has happened on the part of the annuitant. There may be others where the salary depends on the performance of the labour, and where the only remedy in the case of a wrongful dismissal would be by action on the contract for damages.

The question now is, whether there cannot be a breach of such a contract of employment and service as the present by a dismissal; for if so, both parties have agreed on these pleadings that such a breach has taken place. It seems to me quite too late to question the principle upon which so many actions have proceeded in modern times; and which is, that after a dismissal, the servant or party employed may recover such damages as a jury may think the loss of the situation has occasioned. If he has obtained, or is likely to obtain another situation, the damages ought to be less, or nominal, according to the real loss; and in such case the servant need not remain idle, in readiness to give services which cannot be wanted. I quite agree with what was said by my brother ERLE in this House, in the case of *Beckham v. Drake* (1), that where a promise for continuing employment *is broken by the master, it is the duty of the servant to use diligence to find another employment. If such an action was not maintainable, and the only remedy was by action of debt for the salary, the servant could enter into no inconsistent employment; or, if he did, could recover nothing. Thus, suppose that the servant chooses to enter into a situation at a smaller salary, he could maintain no action at all, because he could not aver that he continued ready to serve till the salary became due. Suppose a clerk or agent to be engaged for some years at a yearly salary and to be wrongfully dismissed, surely he is not bound to

(1) 81 R. R. 317 (2 H. L. C. 606).

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remain idle, and to sue his employers every year for his salary; but he may engage himself elsewhere, and at once bring an action for the dismissal; and he does not, by engaging himself elsewhere, lose a right to this remedy, as he would to the other supposed remedy. If there is a contract to keep in the employment, it seems necessarily to follow that a dismissal from such employment is a breach of contract.

The result of the modern authorities, as to the remedies of a servant wrongfully discharged, is well discussed in the passage in Smith's Leading Cases (1). He is said to have the election of treating the contract as continuing, and suing for damages for the breach by the discharge; or, of treating it as, and acquiescing in its being, rescinded by the wrongful act of the master, and bringing an action on the *quantum meruit* for the work actually performed; and it is added, that he may wait till the termination of the period for which he was hired, and may then, perhaps, sue in *indebitatus assumpsit* for the whole wages, relying on the doctrine of constructive service. It is clear, since the decision of *Fewings v. *Tisdal* (2), that this last remedy cannot be maintained in the shape of *indebitatus assumpsit*; for the simple reason, that the allegation of his being indebted for work done is untrue. But that decision may be supported on the form of action; and the question is still left undecided, how far a special action of debt averring a contract to pay, a continuing readiness on the part of the servant during all the period to serve, and a dispensation from the service on the part of the master, might not be maintained. A great part of the argument of the counsel for the plaintiff in error at your Lordships' Bar proceeded on this point. But even supposing that they were correct, that such an action would have been maintainable on the particular contract, it by no means follows that the servant should be bound so to wait, and that he may not elect the first of the remedies, and sue for the breach in not continuing him in the employment. Whatever doubt remains as to the law on the supposed third remedy, I am not aware that the first has been ever doubted, in cases where it appears that there was to be the continuing relation of employer and servant, which is the real question in this case.

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The cases of *Aspdin v. Austin* (3) and *Dunn v. Sayles* (4) must, I think, be considered as decided upon the construction of the

(1) *Lampleigh v. Brathwait*, Hob.

105; 1 Sm. L. C. 67 [141, 11th Ed.].

(2) 1 Ex. 295.

(3) 5 Q. B. 671.

(4) 5 Q. B. 685.

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particular covenants and the peculiar circumstances appearing in those cases. If they are to be taken as deciding that there is no obligation on the part of the employer to continue the relation between the parties in cases like the present, or that, where there is an agreement to employ and serve for a specified time at a specified salary, an action is not maintainable against the employer immediately for a wrongful termination of the relation, but that the party discharged, instead of suing for damages immediately, *must wait, and remain idle till the end of the specified period, and then sue for the salary as a sum certain; I should think that they ought not to be supported in a court of error.

In the present case I think that the contract was a contract for an employment and service to continue at least for a year; and that the promise to retain and employ, laid in the second count of the declaration, does not enlarge the promise arising from the employment; and that the wrongful dismissal, which is the real breach, gave a right of action for the damages really sustained by reason of the dismissal.

I answer your Lordships' question, therefore, by saying that, in my opinion, a plaintiff would, in the courts of law, be entitled, after verdict, to judgment upon a count in the form of the second count set out in this record.

[Mr. Baron MARTIN, Mr. Justice TALFOURD, Mr. Justice WIGHTMAN, Mr. Justice ERLE, Mr. Baron PLATT, and Mr. Justice COLERIDGE also expressed opinions that the second count was good after verdict.]

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MR. JUSTICE MAULE:

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In order to answer this question, it is necessary to consider whether the breach of promise, in not continuing to retain and employ the plaintiff as attorney and solicitor, but dismissing him, is a breach of any promise which the count shows the defendants to be bound by, so as to give *the plaintiff a cause of action against the defendants. That this dismissal, and not the non-payment of the salary (which is also alleged in the count), is the only breach and cause of action (if any) contained in the count, there is no doubt. It was so agreed in the argument before this House, and in the Courts below. It is therefore not necessary to say anything in proof of that proposition. The breach being so understood, it was objected to this count (among other things) that the promise to retain and employ the plaintiff being founded on an executed

consideration, *i.e.*, on the agreement made before the promise, is without sufficient consideration, not being such a promise as the law would imply from the consideration, or, which is the same thing (when the consideration is a preceding agreement), not being comprised in the agreement itself. It was not denied that such was the rule with respect to promises on executed considerations, and as it is a rule well established by decisions, it is not necessary to give any reasons in its support, or to say anything to show it to be a good and useful one.

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On this part of the cases it was further agreed that the agreement, as stated according to its legal effect in the declaration, does not contain any promise to employ the plaintiff in the sense of giving him work to do. But the defendants insisted that the promise to retain and employ, as stated in the declaration, did not comprehend any obligation to give any work to the plaintiff to be done, but only meant that the defendants would continue the relation of attorney and client between the plaintiff and themselves, giving him business to do or not, as they pleased, but paying him his salary while that relation should continue. And this promise, that is, to retain and employ in this sense, it was said was comprehended in the agreement, and therefore implied by law from the fact of making the agreement. *What "chiefly weighed" with the Exchequer Chamber when it adopted this construction was, that it supported (as that Court held) the declaration; whereas the other construction, which treats the word "employ" as comprehending giving work to do, would (as it was insisted by the defendants, and admitted by the plaintiff and the Court) make the declaration bad. And there is no doubt that it is a rule of construction, that of different meanings of a pleading which is susceptible of more than one, that is to be adopted, after verdict, which will support the pleading. And it may further be conceded, that the word "employ" is sometimes used in the sense which this construction gives it, though it may be questioned whether this word can properly be understood in this sense on the present occasion. So to understand it will render wholly inoperative the promise to retain and employ, which is stated as an additional and distinct promise beyond that to perform the agreement, but which this construction treats as comprehended and involved in the promise to perform the agreement. And further, this sense is not consistent with the allegation in the declaration, which states as a consequence of the dismissal, not only the loss of the salary, but of the gains and profits which the plaintiff

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otherwise might and would have derived from such employment. This allegation, it is true, is not necessary to show a cause of action; and the plaintiff might succeed without proving it; but it is not the less effectual in showing that the word "employ" is used in the sense usually given to it, and not in that which the construction in question ascribes to it. If this be the true sense of the word, as used in this declaration, the count is undeniably bad.

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But assuming that the word "employ" may, notwithstanding these reasons, be construed in a sense in which it does not add anything to the promise contained in the *agreement, and that the declaration may be construed as if it contained no promise but that to perform the agreement, it is still to be inquired whether the declaration so construed will show a cause of action. This is indeed the substantial question in the cause, and is in effect this, whether the agreement stated in the declaration obliges the defendants to continue the relation of attorney and client between themselves and the plaintiff for a year. And this depends upon the true meaning of the agreement as stated in the declaration. Now it is to be observed, that that agreement does not in terms provide that the plaintiff shall act as the defendants' attorney, or that they should employ him (in any sense of that word), but begins by providing that from the 1st of January the plaintiff, as attorney and solicitor of the defendants, should receive and accept a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business. It then goes on to show what shall and what shall not be general business within the meaning of the parties; that is, that certain attendances shall be, and business about suits at law, &c., shall not be, general business to be paid for by the 100*l.* And this is all that the agreement contains. The plain object, therefore, of the agreement appears to be the substitution of a new mode of payment as to certain business for a mode previously acted upon, or intended, or agreed on, or contemplated between the plaintiff and the defendants. And this object, and this only, it appears to effect, leaving everything else in the relation between the parties as it stood before the agreement, or entirely at large, if no relation at all subsisted. On this view the meaning of the agreement is, that the plaintiff, if he continues the service a year, shall be paid 100*l.* for his general services; but if he do not, his right as against the defendants, and theirs against him, remain to be regulated by any other agreement which may have provided for such

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*an event, or by the general law as applicable to the transactions which have taken place between them. That the agreement contemplates the possibility or the probability that the plaintiff may continue in the service of the defendants for a year, or for a number of years, there is no doubt. It certainly provides for that event, and indeed for no other; but it by no means follows that it was the intention of the parties to bind themselves by this agreement that such an event should take place. There are no words importing such an obligation; and it would manifestly be inconvenient that any such obligation should exist in the absolute and unqualified form in which (if at all) it must be considered as contained in this agreement. Nothing is more common than to make an agreement in the expectation that a certain state of things will arise or will continue, and with provisions and stipulations applicable to such expected continuance, and which cannot take effect in any other event, yet without any intention that the parties shall be bound to continue the contemplated state of things. The cases of *Aspdin v. Austin* (1), and *Dunn v. Sayles* (2), are instances of agreements in which a certain duration of the relation between the parties was contemplated and provided for, without binding the parties to continue it for the time contemplated. But probably the case in which an alteration in the amount or mode of payment, and that alone, is intended, is of the most frequent occurrence of this class of agreements; and, as before observed, the agreement in question apparently contains no other provision. If the agreement had been intended to provide for the continuance of the engagement, it is difficult to conceive that it would not have contained express and detailed provisions on the subject, and particularly some provision for putting *an end to the engagement by notice or otherwise. The inconvenience of the defendants being bound at all events (if not to use the actual services of the plaintiff) at least to hold him out as filling a confidential situation in their service for a year, or indeed (as the agreement contains nothing to restrict the employment to one year, nor any power to put an end to it) for an indefinite number of years, and themselves to carry on their business for the same time, is of the same nature as the inconvenience relied on by the Court of Queen's Bench in the cases cited. The present case was, indeed, distinguished in the Court of Exchequer Chamber from those in the Court of Queen's Bench, as regards the argument from inconvenience, inasmuch as it is said by the Court that the

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(1) 5 Q. B. 671.

(2) *Id.* 685.

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defendants “were a Company which was sure to continue for the term of a year.” But this distinction does not appear to be well founded. If this particular Company had been one that was sure to continue a year from the time of the agreement, this is a fact not apparent on the record; and supposing the Court to have been well assured of this fact by some other means, it cannot properly be taken into consideration in deciding whether this count is good or not; nor can it be said that joint-stock Companies in general are sure to last a year from the time of making an agreement respecting the employment of an attorney, or from any other time, so as to enable the Court to notice this as a matter of general notoriety. The experience of courts of justice in winding-up cases, and others in which such Companies are concerned, is sufficient to show that nothing certain can be affirmed with regard to their probable duration.

Considering, therefore, this agreement to be one merely regulating the mode of payment of the plaintiff, and not binding either party in any other respect, it follows that it imposes no such obligation as the breach in this count *assumes to exist, and consequently that the count shows no cause of action, and that a plaintiff in the courts of law would not be entitled, after verdict, to judgment upon a count in the form of the second count set out in this record.

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[666] MR. BARON PARKER :

In answer to the question proposed by your Lordships, I have to state my opinion that the plaintiff, in the courts of law, would be entitled to judgment upon a count in the form of the second count set out in this record.

The substance of the question in the case lies in a very narrow compass. Assuming that the alleged promise “to retain and employ” cannot be held valid on this count, unless it is implied in the agreement previously stated, the question is this: In a mutual agreement between the plaintiff below (an attorney and solicitor), on the one hand, and a Life and Fire Assurance Annuity Company on the other, the terms of which are, that it is agreed between them that the plaintiff, as the attorney and solicitor of the Company, should receive and accept a salary of 100*l.* per annum, in lieu of rendering an annual bill of costs for general business done for the Company, and should, for such salary of 100*l.*, advise and act on all occasions (with certain exceptions), is it or is it not implied that the Company did hire him for one *year certain? I must say I feel no doubt in giving the opinion that it is so implied. The term

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"it was agreed" makes the words of the agreement those of both parties; and where two parties agree that one shall accept and receive a yearly salary of 100*l.*, as attorney and solicitor of the other, and for a particular class of business, it is necessarily implied that the other shall pay it, and at the end of the year. It is not to be paid, simply and at all events, at the end of the year, but as a reward for the services of the other as an attorney and solicitor, for his attendance and advice when required, and being ready to give it whenever it shall be asked, at all times during that year. In this respect, the agreement being by both parties, the present case is distinguishable from *Sykes v. Dixon* (1).

So far, if I correctly understand, the parties do not differ. But the defendants contend, that the only agreement to be implied on their part is, that they will pay the 100*l.* at the end of a year, for the services of the plaintiff as attorney and solicitor, in the matters specified in the agreement; and that they do not hire, or, in other words, agree to retain him in their service in that character in the mean time. On the other hand, the defendant in error contends that in such an agreement there is also implied a hiring, or agreement to retain in that character for a year; and I am of that opinion. I think that there is clearly implied on the part of the person who contracts to pay a salary for services for a term, a contract to permit those services to be performed, in order that the stipulated reward may be earned, besides an agreement to pay the salary at the end of the term. It seems to me that this is clearly an agreement to retain for a year certain; and the only doubt I have felt since the case was first argued in the Exchequer Chamber, has been, *whether there was an implied agreement to employ the plaintiff. There is not, if that term is used in the sense of giving him business to do, for no such obligation is cast on the Company; but if it means only to engage his service (one of the meanings of that term given in Johnson's and Webster's Dictionaries), there is an implied promise to that effect. The employment in many capacities may be said to continue, where the use of actual service is optional or conditional on the part of the employer. Medical advisers, members of theatrical establishments, even some descriptions of household servants, may be employed at annual salaries, though no actual service may be ever required. It is not those only who are actually called upon to perform duties, but those who are under an obligation to perform them, who are employed.

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(1) 48 R. R. 641 (9 Ad. & El. 693).

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I think, for the reasons explained in the judgment of the Exchequer Chamber at more length (1), that we ought to understand this expression in that sense of the word "employ" which will support it; and "employ," therefore, means only "to retain" in their service, and is mere tautology. The distinction is very important indeed, between an agreement to retain and employ, in the sense before referred to, for a given term, and then to pay for services at the end of the term, a sum certain, and simply to pay a sum certain for services at the end of a given term. In the former case the person employed has an immediate remedy the moment he is dismissed without lawful cause, for a breach of the contract to retain and employ, and will recover an equivalent for the breach of the employer's contract, which may be less than the stipulated wages payable at the end of the term, if it happens that he has the opportunity of employing his time *beneficially in another way, and the employer is not bound to pay the whole agreed sum. But in the latter case, that is, if the agreement is that the person retained is to be paid a certain sum for his services at a certain time, provided he serves, there being no contract to retain and employ during the term, he can only maintain an action after that time has arrived, for non-payment, and then is entitled to recover the full amount, though his loss may be much less. Convenience is decidedly in favour of construing such agreements to be contracts for retaining as well as for the payment of wages.

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There are certainly cases where, in construing contracts between the employers and the employed, where payments at certain times are stipulated to be paid for services, the Courts have not been able to put such a construction upon them; and where they have held, that the contract imported only an agreement to give certain sums at certain times. Two cases of this description were those of *Aspdin v. Austin* (2) and *Dunn v. Sayles* (3). Both these are clearly distinguishable.

In the former the question turned upon the construction of a contract on the part of the plaintiff to make cement for the defendant and one Sealey, and to teach them how to do so; and on the defendant's and Sealey's part to pay a weekly salary for three years; and the point was, whether there was an implied contract to continue to employ him to manufacture cement for that period. The Court could not draw that inference, and Lord Denman, in giving

(1) 6 C. B. 177.

(2) 5 Q. B. 671.

(3) *Id.* 685.

judgment, assigns a very strong reason for refusing to do so, viz., that the defendant would in that case be obliged, at however great loss to himself, to continue his business for three years.

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The Court, therefore, construed the contract to be a contract only to pay sums at the stated periods for three years, on condition of the plaintiff's performing the conditions precedent; and he would be entitled to recover them on being ready and willing to perform those conditions, being prevented by the defendant's act from so doing.

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In the other case, which depended on the construction of the defendant's covenant in an indenture, the term, "it was agreed," which would make the stipulation the agreement of both parties, was wanting. It was a simple covenant by the defendant, who, in consideration of the services of the plaintiff's son as an apprentice to the defendant, a surgeon dentist, covenanted to pay weekly sums for five years. The reasons assigned in the former case equally applied to that, as Lord Denman observed; and indeed it would be a strong thing to imply that the plaintiff, who had only covenanted to pay certain sums weekly, thereby impliedly covenanted to carry on the business of a surgeon dentist, at whatever loss or inconvenience to himself, for five years.

A case to the contrary, of a special contract, where the Court held that there was an agreement to employ for seven years, was *Pilkington v. Scott* (1). In the present case, we have to construe the mutual agreement of two parties expressed in the words of both; and we must assume that we have all the agreement before us, which is the consideration for the mutual promises; one a Company for life and fire assurance and the grant of annuities, which must necessarily have been sure to continue, in the contemplation of both parties at least, whether in fact or not, for a much greater time than a year; the other an attorney, whose advice and assistance would, without doubt, be often required in the conduct of such a business.

I feel quite satisfied that in such a case as this there is, upon the true construction of this agreement, an implied agreement upon the part of the defendants below to retain the plaintiff, and to employ the plaintiff in the sense in which I understand this word, for one year at least.

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It is, however, suggested that the purport of the agreement is only to vary the remuneration of the plaintiff, and change it from an annual bill of costs to an annual salary; the employment of the attorney being for an indefinite time. I do not think that this can

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be inferred from the agreement stated in the second count. The annual bill, as well as the annual salary, equally refer to an employment at least for one year; and the agreement in the first count (supposing it could throw any light upon the construction of that in the second) cannot be referred to for that purpose. The question is on the contract in the second count only, and the existence of that in the first count is negatived by the issue on *non assumpsit* as to that count being found for the defendants.

The assessment of damages at the large sum of 200*l.* for the breach of the contract to retain and employ was mentioned in the course of the argument at your Lordships' Bar, to show that the word "employ" must have been understood on the trial in a different sense to that which is attributed to it in the Court of Exchequer Chamber, and held to mean the supplying the plaintiff with business. But this is a mere conjecture. If it is well founded, or the damages are excessive, an application should have been made to the Court of Common Pleas for a new trial. In the present stage of the cause, if the count is sufficient in point of law, the amount at which the damages are assessed is perfectly immaterial.

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Therefore I think that the second count is good, and *that the plaintiff below would be entitled to judgment upon it.

Aug. 12.

LORD TRURO, having stated the pleadings and verdict, said :

In the Court of Common Pleas, the judgment was arrested after verdict, the count having been held bad upon the ground that it alleged an entire promise on the part of the Company to perform the agreement, and to retain and employ the plaintiff as attorney and solicitor of the Company on the terms of the agreement, and that there was no sufficient consideration for that part of the promise which alleged a promise to retain and employ the plaintiff, it being held by the Court that the language imported an obligation to furnish actual employment to the plaintiff in his profession of an attorney, and that inasmuch as the consideration set forth was in the past tense, that the plaintiff had promised to perform his part of the agreement, which consideration being a past or executed promise, was exhausted by the like promise of the Company to perform the agreement, and did not enure as a consideration for the additional part of the promise alleged to retain and employ the plaintiff in the sense before mentioned, as also to perform the agreement.

A writ of error was brought upon the judgment of the Court of Common Pleas, and the Exchequer Chamber gave judgment,

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reversing that decision, and held that the legal effect of the agreement was, that the Company promised to retain and employ the plaintiff as its attorney and solicitor for an entire year, in the sense, not of finding actual employment for the plaintiff, but of continuing the relation of attorney and client for a year, at the stipulated salary; and that the allegation of the promise to retain and employ the plaintiff upon the terms of the agreement, was *in effect no more than a reiteration of the promise to perform the agreement, and that such words ought, therefore, to be rejected as surplusage; and in that view the consideration alleged was sufficient to support the premises.

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Upon this judgment of reversal a writ of error was brought in Parliament, and the case has been argued at your Lordships' Bar; and upon the part of the plaintiff in error it has been contended that the construction put by the Court of Common Pleas on the promise to retain and employ the plaintiff was consistent with the true legal import of the words, and that no sufficient consideration was averred to support the promise understood in its proper sense, and the special damage alleged was referred to as furnishing proof that the pleader had averred the promise to "retain and employ" in the sense which the Court of Common Pleas had attached to it. The special damage alleged was not only the loss of the salary, but also the loss of the profit which would have been earned by the preparation of securities and conducting suits and defences.

It was further argued, that although the allegation of special damage, which in law was not referrible to the promise or the breach of it, would be mere surplusage, and furnish no matter of objection, yet it might be referred to for the purpose of explaining the sense in which an averment in the declaration, expressed in equivocal words, was intended to be understood.

Further, it was contended that if the promise "to retain and employ" meant no more than to continue the relation of attorney and client for the year, and to pay the 100*l.* salary at the end of the year, then no sufficient breach was assigned, the breaches assigned being, first, the refusal, in the middle of the year, to continue to retain and employ the plaintiff; and secondly, to pay the salary.

With regard to the refusal to continue to retain and *employ, it was said that such refusal gave no cause of action, because it could occasion no actual or implied damage to the plaintiff, as such

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continuance to retain and employ him was not necessary to entitle him to the salary of 100*l.*; that it was sufficient so to entitle the plaintiff that he should continue in a situation capable and ready to be employed if called upon to perform service; and that in regard to the non-payment of the salary, the non-payment was not averred, but only a refusal to pay, which, it was contended, was not equivalent to an averment of non-payment; and as to the alleged loss of the gain and profit which would have been gained by him in the prosecution and defence of suits, and the preparation of securities, both Courts had concurred in the opinion that that agreement did not create any obligation upon the Company to furnish such employment, and that it could only be referred to, as before mentioned, to explain that the averment of the agreement of the Company to retain and employ, was used in the sense of furnishing the plaintiff with actual employment as an attorney.

Upon the part of the defendant in error, it was answered that the objections urged by the plaintiff in error were founded upon a misconstruction of the words "retain and employ," which, it was contended, did not import an obligation to find actual work for the plaintiff to do, but only to retain and employ the plaintiff in the sense of continuing the relation between him and the Company of attorney and client for the year, and that the untimely and unjustifiable dissolution of that relation within the year, was a refusal to retain and employ the plaintiff, and gave an immediate cause of action; and that the breach was well assigned by the allegation of the refusal of the Company to retain or employ the plaintiff on the terms of the agreement, or to pay him his salary of 100*l.*; and that the special damage averred was *immaterial, and could not affect the question, whether the promise and the breach were well pleaded.

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The case, therefore, resolves itself into the question, What is the legal import of the averment that the Company promised to perform the agreement, and to retain and employ the plaintiff for a year upon the terms of the agreement; whether the words import a contract beyond the strict legal effect of the agreement itself? If they do not, the mutual promises to perform the agreement are a sufficient legal consideration to sustain the count.

Your Lordships were therefore pleased to put the question to the learned Judges, "Whether the plaintiff would be entitled,

after verdict, to judgment in the Courts below, upon a count in the form of the second count set out in this record?"

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Eight of the learned Judges have stated their opinions to be, that the plaintiffs would, in the courts of law, be entitled, after verdict, to judgment, upon a count in the form of the second count set out in this record. One of the learned Judges has expressed a contrary opinion.

The case now remains for your Lordships' judgment; and although I am strongly impressed by the reasons assigned by the learned Judge whose opinion is adverse to the validity of the count, and I should myself have been well content to have acted upon that opinion, yet I think that, from the respect due to the opinions of the learned Judges, and to the reasons by which those opinions are supported, considering the question to be one of construction and pleading, with which those learned Judges are peculiarly conversant, I cannot but advise your Lordships that the safer course will be to act upon the opinions of the eight learned Judges, and to affirm the judgment.

I cannot, however, omit to observe that the record furnishes strong grounds for believing that the sense which *the single learned Judge, whose opinion is against the validity of the count, has ascribed to the promise to "retain and employ," in the sense in which the averment was intended to be understood, that is, that the agreement created an obligation upon the Company, not only to perform the agreement by retaining the plaintiff for a year as the attorney and solicitor of the Company, at the salary of 100*l.* a year, but also to retain and employ him to prepare the securities referred to, upon the terms of being paid professional charges in those respects, is correct. I think that the Judge at Nisi Prius must have so construed the promise, as the plaintiff actually recovered damages for the breach of the agreement in that sense, although the declaration is now held valid only because the eight learned Judges reject that construction.

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That the pleader inserted the averment in the repudiated sense is apparent from the form of the breach assigned, because, after alleging a breach of the agreement by the Company in dismissing the plaintiff, and refusing to employ him as attorney and solicitor for the Company for a year, or to pay him his salary, the declaration alleges that he was thereby deprived of his salary of 100*l.*, and was also deprived of the gains and profits which he would have

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derived from such employment in and about the prosecuting and defending of divers suits respectively brought by and against the Company, and in and about the preparing of divers bonds, contracts, and securities for the Company; and further, the declaration alleges that part of the salary of 100*l.* had been paid before the commencement of the action; so that if the promise was only to retain and employ the plaintiff for a year at a salary of 100*l.*, the plaintiff's claim to damages was limited to the amount of the balance of the salary of 100*l.*, yet the plaintiff has obtained a verdict of 200*l.* damages, to which he could only be *entitled provided the promise alleged in the declaration was to be treated as a promise, not only to retain him for a year at 100*l.* salary, but also to furnish him, in addition, with profitable employment.

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It is possible, however, that the pleader might contend that the allegation of a promise to "retain and employ" was used only to explain that the promise to perform the agreement was, in legal effect, a promise to retain and employ the plaintiff as attorney for the Company for a year, and that the special damage, by the loss of the profit of prosecuting and defending actions, and of preparing securities, meant only that the plaintiff, by his dismissal from the service of the Company, lost that probable chance of employment to prosecute and defend suits in which the Company should be a party, and of preparing securities, which he would have enjoyed if he had been continued in the service of the Company for the year, and that the jurors were warranted in adding to the balance due in respect of his salary, some damages, by way of indemnity, for the loss of that contingent employ which was incidental to his character of attorney for the Company. The case, however, has not been presented to your Lordships in that view, and the cause is now before you in the position of the record, containing a contract, ambiguous in its terms, which, being understood in the sense in which alone the plaintiff would be entitled to a judgment in his favour, his right to damages could not amount to 100*l.*, and he has recovered a verdict and costs for a judgment for 200*l.* damages, to which he could alone be entitled provided the contract averred is to be understood in the sense which the plaintiff repudiates, and which the eight learned Judges say cannot legally be ascribed to it. Injustice, therefore, has manifestly been done; your Lordships can afford no relief against that injustice; but I should have thought that for such an incongruity upon the *face of the record some

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remedy might have been found, either by a *venire de novo*, if the plaintiff refused to remit the amount of the excess of damages, or by some other means; and unless the Court of Common Pleas can exercise a summary jurisdiction in staying the proceedings upon the payment of the balance of the 100*l.* salary and costs, the injustice is irremediable.

Your Lordships cannot, I think, do otherwise than affirm the judgment, because it is a clear rule of law, that if a declaration contains allegations capable of being understood in two senses, and if understood in one sense it will sustain the action, and in another it will not, after verdict it must be construed in the sense which will sustain the action.

Judgment affirmed, with costs.

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(4 H. L. C. 679—814; S. C. 1 C. L. R. 950; 17 Jur. 939; revsg. 12 Q. B. 328.)

In the Ecclesiastical Court the *onus* of proving a rate to have been rightly made lies on those who assert its validity, and if that validity is not affirmatively established, the common law Courts will prohibit the enforcement of the rate.

An order of the Ecclesiastical Court to admit a libel and exhibits to proof is not a definitive sentence.

It is the duty of the parish to repair the fabric of the parish church, and the neglect or refusal to perform this duty will subject those who so neglect or refuse to punishment in the Ecclesiastical Court.

A valid church-rate can only be made by an actual or constructive majority of the parishioners in vestry assembled, and if the majority should refuse to make a rate for the purpose of discharging this duty, the refusal would not entitle the minority to make the rate.

An irrelevant vote on a proposition submitted to a vestry meeting does not prevent those who gave it from afterwards voting on any other proposition relating to the same subject proposed at the same meeting. Therefore:

A resolution passed by the majority in vestry to declare that no church-rate is necessary, and to refuse any such rate, does not disentitle the persons composing that majority to vote upon the question of any particular proposal for a rate made by any of the minority; and if a rate should be made by the minority alone, the votes of the other persons present not having been taken on it, such rate will be bad.

At a vestry meeting assembled under a monition from the Ecclesiastical Court to consider of and make a rate for the repairs of the parish church, an estimate was produced by the churchwardens, and a rate of 2*s.* in the pound proposed by them. No objection was made to the estimate, but an amendment was passed by the majority that church-rates were bad in principle and ought to be refused, and the vestry did refuse to make a rate

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c.
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1852.
Feb. 16, 17.

Lord
TRURO, L.C.
Lord
BROUGHAM.

Lord
CAMPBELL.

1852.
July 25.

1853.
Aug. 12.

Lord TRURO.
Lord
BROUGHAM.
Lord
CRANWORTH,
L.C.

PLATT, B.
MARTIN, B.
PARKE, B.
CROMPTON, J.
TALFOURD, J.
ERLE, J.
WIGHTMAN,
J.
COLERIDGE,
J.
MAULE, J.
WILLIAMS, J.
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(1) Compulsory church-rates were abolished in 1868 by stat. 31 & 32 Vict. c. 109.

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accordingly. The vicar, churchwardens, and certain others of the vestry, without taking any vote on the question, did afterwards produce and sign a rate of 2s. in the pound :

Held, that the rate thus agreed to was invalid.

In a suit to enforce such a rate, the libel, after setting forth the refusal of the majority to make the rate, contained this allegation : "The churchwarden proposed addressing himself to those ratepayers who were willing to obey the monition, that a rate of 2s. in the pound should be made by them, and a rate of 2s. in the pound is produced and signed by the vicar, the two churchwardens, and several ratepayers present. The mover of the amendment protested," &c.

Semble, that this allegation showed the rate to have been made by the minority ; but,

Held, that to sustain the suit, the libel must show the rate to have been made by the majority of the vestry ; for that no other rate is valid.

THIS was a writ of error on a judgment in prohibition. The declaration in prohibition set out all the proceedings in the case. Gosling was an occupier of lands within the parish of Braintree, in the county of Essex ; Veley was one of the churchwardens of that parish (1). In January, 1842, Gosling was cited in the Consistorial and Episcopal Court of London for subtraction of church-rates. The libel alleged that the parish church of Braintree was, and long had been, in urgent need of repair ; that no church-rate had been granted or collected since March, 1834 ; that on several occasions a church-rate had been refused in vestry ; that, after other proceedings had taken place (which the libel set forth (2), a monition was issued, in obedience to which a vestry assembled, on the 15th July, 1841, at which the Rev. Bernard Scale, the vicar of the parish, was present and took the chair ; that the monition and the notice convening the meeting were read ; that a survey of the *repairs and an estimate of the expenses were produced and read by the churchwardens ; that the necessity for such repairs was not denied ; that Veley proposed a rate of 2s. in the pound, which motion was seconded by Richard Lacey, a parishioner ; that thereupon an amendment was moved by Samuel Courtauld, and seconded by Edward George Craig, two other parishioners, to the effect following : "That all compulsory payments for the support of the religious services of any sect or people appear to the majority of this vestry to be unsanctioned by any portion of the New Testament Scriptures, and altogether opposed to, and subversive of, the pure and spiritual character of the religion of Christ. But that for any one religious sect to compel others, which disapprove their forms of

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(1) Mr. Joslin, the other churchwarden, died after the commencement of the proceedings.

(2) See all these proceedings, which are not necessary for the report of the present case, fully stated 7 Q. B. 406.

worship or system of Church government, or which dissent from their religious principles and creeds, to nevertheless submit to, support and extend them, appears to this vestry to be a yet more obvious invasion of religious freedom and violation of the rights of conscience; while also it appears to be a gross injustice to Dissenters, as citizens, to compel them to pay for the religious services of others, in which they have no part, while they build their own chapels, support their own ministers, and defray the charges of their own worship. That compulsory church-rates, and more especially such rates upon Dissenters, thus appearing to be, as a tax, unjust, and as an ecclesiastical imposition, adverse to religious liberty, and contrary to the spirit of Christianity, this vestry feels bound, by the highest obligations of social justice and of religious principle, to refuse to make a rate, and does refuse accordingly."

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The libel then went on to state that a show of hands was taken upon this amendment, and a great majority of the parishioners and ratepayers then present was declared by the chairman, as the fact was, to be in favour of the amendment, *which was thereupon declared to be carried; and no person then and there demanded a poll on the amendment, or asserted or intimated that the same was not duly carried. "That immediately after the premises then next before pleaded, and while the said parishioners still continued as aforesaid in vestry assembled, the question was then and there put, whether any other amendment was proposed, or any other proposition as to the amount of rate was made; that no affirmative answer was returned to such question, nor was any other motion or proposition made for or towards discharging the obligation cast by law and the custom of the realm upon the said parishioners, of repairing their parish church, and of providing necessaries for the decent celebration of Divine service and offices therein, and for and towards the other expenses necessary and legally incident to the office of churchwarden for their year of office; that the majority of the said vestry having, by the acts and means aforesaid, refused to furnish the churchwardens of the said parish with the necessary funds as aforesaid, the now defendants, the churchwardens aforesaid, and others of the ratepayers and parishioners of the said parish, then and there present in vestry, on the said 15th of July, as thereinbefore pleaded, did, in obedience to the aforesaid monition, and in discharge of the aforesaid obligation, cast upon them and the other parishioners of the parish

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of Braintree aforesaid, by the law and custom of this realm, at the said meeting of the said parish, and while the parishioners so continued as aforesaid in vestry assembled, rate and tax all and every the inhabitants and parishioners of the parish of Braintree aforesaid, liable to contribute to a church-rate, for and towards the necessary repairs of the church of the said parish, and for and towards providing necessaries for the decent celebration of Divine service and offices therein, and for and towards the other expenses necessarily and legally *incident to the office of churchwarden for the current year, the several sums of money mentioned in the said rate, being a rate or assessment of 2s. in the pound on the annual value of all rateable messuages, &c. occupied within the said parish, for and towards the purposes aforesaid; and that accordingly a rate of 2s. in the pound was then and there produced, made, and signed by the said vicar and churchwardens, and others of the parishioners and ratepayers then and there present."

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The libel then went on to allege the reasonableness of the general rate, and of the individual assessment on Veley; set forth in proof the minutes of the vestry, and the document alleged to be the rate, which was in the following terms: "We, the churchwardens and other parishioners of the parish of Braintree, in the county of Essex, whose names are hereunto subscribed, do hereby, this 15th day of July, in the year of our Lord, 1841, at our vestry meeting for that purpose, duly and legally convened and assembled, in pursuance of, and in obedience to, a monition issuing out of the Consistorial and Episcopal Court of London, rate and tax all and every the inhabitants and parishioners of the parish of Braintree aforesaid, liable to contribute to a church-rate, for and towards the necessary repair of the *church of the said parish, and for and towards providing necessaries for the decent celebration of Divine service and offices therein, and for and towards the other expenses necessary and legally incident to the office of churchwarden for the current year, the several sums of money hereinafter mentioned, being a rate or assessment of 2s. in the pound on the annual value of all rateable messuages, lands, tenements, and hereditaments occupied within the said parish." The usual tabular form of a rate was then added, and it was signed by the vicar, the churchwarden, and eighteen inhabitants. Forty-four parishioners, who were not present at the meeting aforesaid, afterwards signed their certificate of approval of the same.

The declaration, having thus fully set out the libel and the

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proceedings in the Ecclesiastical Court, averred that Veley had there opposed the admitting to proof of the libel and exhibits, alleging that the pretended rate was made without lawful authority, and denying the jurisdiction of the Consistorial Court; that Dr. LUSHINGTON, the Vicar-General and Official Principal, had rejected the libel and exhibits; that, on appeal to the Arches Court of Canterbury, his decision had been reversed by Sir H. JENNER FUST, the Official Principal of the Arches Court, and Veley had been assigned to answer to the suit in that Court; that that Court had no jurisdiction in the said matter, but was nevertheless still proceeding in the said cause, and Veley prayed judgment of prohibition to the Official Principal of the Arches Court.

There was a general demurrer to this declaration. Joinder in demurrer.

The demurrer was argued in Hilary Term, 1846, before Lord Denman, Ch. J., and Justices Patteson, Coleridge, and Wightman, and in February, 1847, the Court of Queen's Bench pronounced judgment for the defendants in *prohibition (1). A writ of error was brought on that judgment, and was argued in Trinity and Michaelmas vacations, 1848, and in January, 1850, judgment was delivered. The Judges who heard the case were divided in opinion; Mr. Baron PLATT, Mr. Justice CRESSWELL, Mr. Justice MAULE, and Mr. Baron ALDERSON thinking that the judgment of the Court of Queen's Bench ought to be affirmed; Mr. Baron ROLFE (2), Mr. Baron PARKE, and Lord Chief Justice WILDE thinking that it ought to be reversed. In conformity with the opinion of the majority, the judgment was affirmed (3). The present writ of error was then brought.

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The Judges were summoned, and Mr. Baron Parke, Mr. Justice Coleridge, Mr. Justice Maule, Mr. Justice Wightman, Mr. Baron Platt, Mr. Justice Erle, Mr. Justice Williams, Mr. Justice Talfourd, Mr. Baron Martin, and Mr. Justice Crompton attended.

Mr. Serjt. Byles and Mr. Mellor, for the plaintiff in error :

Two points are now submitted to the House,—first, that the minority of the vestry cannot, against the will of the majority, tax the parish, by assessing a church-rate, when the majority has voted against any rate whatever. Secondly, that, on an examination of

(1) 68 R. R. 488 (7 Q. B. 406).

judgment was pronounced.

(2) Mr. Justice Coltman, who had heard the case argued, died before the

(3) 12 Q. B. 328.

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this record, this rate of 2s. in the pound appears to have been made by the minority in the vestry, or at least does not appear to be made by the majority even of those who were willing to make a rate.

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As to the first point, it may be conceded that the parishioners are bound by the common law to maintain the fabric of the church, and that they may be visited with *ecclesiastical censures if they do not fulfil that obligation. But here arises the distinction which entitles the plaintiff in error to judgment. Though bound to repair the fabric of the church, there is no obligation to make a rate for that purpose. * * There is recent and high authority for saying that originally repairs were to be made out of the funds destined for the support of the ministers of public worship: *Hawkins v. Rous* (1); *Velay v. Burder* (2). It is clear that the liability of the parishioners, whatever it is, arises not from the canon or civil law, but solely from the common law, by the rules of which it must be governed. No analogy, therefore, which is applicable to the decision of this case, can arise from any other law. The common law was framed in times when all the people of the realm were of one faith. Voluntary contributions were then generally sufficient for the purpose; but if there were any persons found to be backward in rendering assistance, there were two powerful modes of compulsion—excommunication of the individual, or interdict of the parish. At length the reparation of the church was made legally compulsory (3). If by any of these means the church is repaired, the Ecclesiastical Court *is satisfied: *Methold v. Winne* (4). * * The inhabitants who refuse to pay tithes may be admonished by the Ecclesiastical Court (5), but no other power can be exercised over them; in like manner they may be liable to ecclesiastical censures if the church is out of repair, but not for not making a rate to repair it.

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There is no indictment at common law for not repairing a church, as for not repairing a road. In *Cooper v. Wickham* (6), the fact that a churchwarden had voted in vestry in favour of a resolution declaring church rates “bad in principle, unjust in practice, and uncalled for at the present time,” was held not to constitute an ecclesiastical offence. The Court did not even decide that it would be so if the church was, in consequence of that resolution, still out of repair.

(1) Carth. 360; Holt's Rep. 139.

(2) 12 Ad. & El. 301.

(3) 44 Edw. III. fol. 18.

(4) 1 Rol. Abr. 393, tit. Church-

warden, A. pl. 3—4.

(5) Consetts' Pract. 3rd ed. 316, 409.

(6) 2 Curt. 303.

(LORD BROUGHAM: Because there was no averment to that effect in that libel.)

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Refusing to join in making a rate for repairs, or even wilfully obstructing its being made, does not constitute an offence cognisable by the Ecclesiastical Court: *Francis v. Steward* (1). * * *

(LORD BROUGHAM: You admit that it is compulsory at *common law to repair the church. In what way is the performance of the duty to be compelled?)

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There may be difficulties in the way of enforcing the performance of the legal duty, but their existence will not make any proceeding of this kind valid. The Legislature alone can remove the difficulty. * * The Court of Queen's Bench will not interfere to compel a vestry to make a rate, for that is not a statutable duty, it is only a subject of ecclesiastical jurisdiction: *Rex v. St. Peter's, Thetford* (2); but it will interfere to compel the parishioners to assemble in vestry to consider a proposal for a rate, for the assembling of them for that purpose is a statutable duty cast on the parish: *Rex v. St. Margaret's, Westminster* (3).

(LORD BROUGHAM: So, if a visitatorial power existed, you say that the Court could merely put it in motion.)

Certainly: these cases justify that argument. The power to compel the making of a rate was expressly disclaimed in the judgment of the Court in *Veley v. Burder*, as it had been in the previous case of *Rex v. St. Peter's, Thetford*. The Court there expressly said that it would not grant a *mandamus* to make a rate; and those were cases where the common law liability clearly existed. In a case of this sort, the utmost extent of the law is, that if the duty is not performed, there is a liability to ecclesiastical censures: *Ayliffe* (4). * * *

The argument on the other side defeats itself. If the power of punishing the majority exists, then it is impossible that the votes of the majority can be votes thrown away, or that the majority can be treated as if personally absent from the meeting, for then there would be no ground for punishment. *Rogers v. Davenant* (5) was

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(1) 64 R. R. 698 (5 Q. B. 984).

(8 Ad. & El. 889).

(2) 5 T. R. 364.

(4) *Parergon*, 455—456, ed. 1726.

(3) 4 M. & S. 250; see also *Reg. v. St. Margaret's; Leicester*, 47 R. R. 772

(5) 1 Mod. 194.

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referred to by Mr. Baron PARKE in the Court below, as being an authority to show that a rate made by the minority could not be valid; and it is, indeed, almost conclusive for such a purpose. * * There is no trace anywhere of a rate made by the minority of a vestry, although there have been church-rates since 1870, and although the necessity for so making them has often arisen. * * *

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The first case relied upon by the other side is that of *Gaudern v. Silby* (1), but that case is of no authority. [*Thursfield v. Jones* (2), another case relied on, is distinctly overruled by *Veley v. Burder* (3).]

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In none of the cases, nor in any passage in Ayliffe, Oughton, or Gibson, where, however, all that can be said in favour of the prerogatives of the Church is carefully preserved, is [there any

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suggestion of the minority of the vestry making the rate]. Gibson, indeed, shows that nothing of the sort can be done (4). * * In

Bacon's Abridgment (5), it is said, "The churchwardens have no power to make any rate themselves, exclusive of the parishioners, their duty being only to summon the parishioners, who are to meet for that purpose, and when they are assembled, a rate made by the majority present shall bind the whole parish, although the churchwardens voted against it." In *Wheeler v. Lambert* (6), the question was, whether the churchwarden had been duly elected; and the

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Court said that, "so far as the repairs of *the church were concerned, it did not matter whether he was duly elected, or not: that, if the churchwardens do not agree, yet if the majority of the parishioners tax, it is sufficient. Their chief business is to collect the rate." * * In *Roberts' case* (7), where, after judgment in the Arches, a prohibition was granted, and "the Court agreed that the tax cannot be made by the churchwardens, but by the greater number of inhabitants it may." *Pearce v. Prouse* (8) is to the same effect. * * *

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Church-rates are the mere creatures of the common law, and their validity must be decided by the principles of the common law: *The Chamberlain of London's case* (9), and *Jeffrey's case* (10). The first of these principles is, that no tax can be imposed but by a majority of the people's representatives. The same rule affects Parishes as well as Parliaments. This is the case of a tax, and the

(1) 3 Curt. 272; Johnson's *Braintree case*, 103.

(2) 1 Vent. 367.

(3) 54 R. R. 560 (12 Ad. & El. 265).

(4) 1 Gibs. Cod. 220, tit. 9, c. 4, s. 2.

(5) Bac. Abr. Churchwarden C.

(6) 2 Keb. 573; 3 Keb. 533.

(7) Hetley, 61.

(8) 1 Salk. 165.

(9) 5 Co. Rep. 63.

(10) *Id.* 67.

great principle of English constitutional law must be applied to its imposition. * * All aggregate bodies, acting ministerially, can only declare their will in one of three ways—by unanimous decisions, by an absolute majority, or by relative numbers. Juries must be unanimous; Commissioners appointed to discharge a public trust need not be so: *Rex v. Whitaker* (1). But there must be a majority in order to render any act effectual: *Blackett v. Blizard* (2). The cases, therefore, of juries and of persons acting under *a private or public appointment in a public trust depend on different principles.

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Then comes the case of bodies who declare their will by an absolute majority of the persons constituting them. The House, whether acting in its legislative or judicial capacity, declares its will by an absolute majority; and whatever may be the consequence of a vote, or however any vote of either House of Parliament,—as, for instance, a vote of the House of Commons refusing supplies when war was raging,—might injure the interests of the public, or amount to a breach of public duty, it could never be pretended that the votes of the minority could alone be counted, and the votes of the majority treated as thrown away. * * The third mode of proceeding is by a relative majority, as where there are three candidates at an election, and there are thirty-seven voters,—twelve vote for A., twelve for B., and thirteen for C., the last would be elected, because, relatively to the whole numbers, C. would have the majority. The cases where votes are said to be thrown away are those where a duty has to be performed, and can only be performed in one particular way: *Oldknow v. Wainwright* (3). Where a person is disqualified by law from being a candidate, a vote given to him is thrown away, because in contemplation of law he was not a candidate: *Taylor v. The Mayor of Bath* (4); *Hawkins v. Rex* (5); but these persons may vote again if they please to do so. But those cases do not apply to the present, where the vestry is a deliberative assembly, and not a mere electoral college. * * *

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It does not appear on this record that this rate was put to the vote and was adopted even by the majority of those who were willing that a rate should be made. The allegation merely is, that

(1) 9 B. & C. 648.

(2) *Id.* 158.

(3) 2 Burr. 1017; 1 Sir W. Bl. 229.

(4) 3 Luder's El. Cas. 324, cited in

judgment by WILDE, Ch. J., *Gosling v. Veley*, 12 Q. B. 414.

(5) 14 R. B. 129 (2 Dow, 124).

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the paper was signed by the vicar, the two churchwardens, and several ratepayers then present. That is not sufficient. This proceeding is invalid, and there is good ground for a prohibition. One of the Judges in the Court below said that there should have been a demurrer to this allegation ; but that form is unnecessary in the Ecclesiastical Court, where opposition to proof is equivalent to a demurrer.

The *Solicitor-General* (Sir W. P. Wood) and Mr. Ogle, for the defendant in error :

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The first question is, On whom is thrown the *onus* of showing that the rate is or is not valid ? The object of the suit in the Ecclesiastical Court was only to enforce payment *of the rate. It may be that in that Court the *onus* of showing the validity of the rate was on those who instituted the suit ; here it is reversed, and it lies on those who seek to obtain the prohibition. Such was the distinct and uncontested opinion of the Court of Exchequer Chamber. It has been said on the other side, that the rate is invalid because it does not appear to have been made by a majority of the persons assembled in vestry ; but the answer to that is, that it has been duly made, because it was made by all the parishioners assembled at that vestry who legally expressed any opinion on the subject. The vestry being assembled, a proposition was made for a rate of 2s. in the pound. Something called an amendment was then proposed ; but it was no amendment, it was a mere argumentative declaration of opinion, and the fact of its being put from the chair did not confer on it the character of a lawful amendment. It did not negative the resolution proposed. A resolution beside the proper business of a meeting is not a resolution of that meeting, it is not a part of the business which the meeting was assembled to perform.

The analogy between this case and the case of an election is very strong. The electors have a certain legal duty to perform. They must perform it, or their votes are lost. The electors of a borough are assembled to elect a mayor. A. B. is proposed for the office, on which a resolution is proposed that there shall not be any mayor ; that does not negative the proposition for the election of A. B. If carried, it will not interrupt the election, which must proceed in spite of such a resolution. Here, too, while the meeting still continued assembled, for there is no averment that it was dissolved, and while the subject was still under consideration, the

rate was made by those who were willing to perform the duty for which they had assembled, and who were on that account the only persons whose acts the law can regard. It was made by the majority of those who were lawfully taking part in the proceedings of the vestry. The others must be considered to have withdrawn.

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The rate is regular in substance and in form. The church is conceded to have been out of repair; the legal duty to repair the church is admitted; the meeting was summoned for the purpose of discharging that duty; and the resolution which is said to be a negation of the rate is nothing but a refusal to proceed with the proper business of the meeting, which refusal is illegal and void. The persons who so refused must be considered to have absented themselves, and to have left the others to perform the legal duty which they had neglected; the act of those others then became the act of the whole meeting.

(THE LORD CHANCELLOR: It is not proved that the rate was voted on,—it is alleged to have been produced and signed.)

The burden of establishing its invalidity lies on the other side. For anything that appears to the contrary, it may have been signed by the whole meeting.

(THE LORD CHANCELLOR: No; it is expressly stated that Caulfield and others protested against it.)

No strict form of proceeding is necessary to make a good rate. It is not necessary to put it to the vote. It may be made without objection taken. * * *

But then it is said, first, that the making of a rate is not the only mode of performing the duty which is admitted to exist. Secondly, it is said that, assuming the making of a rate to be the only proper mode of performing the duty, still the only mode of enforcing its performance is by punishing the contumacious with excommunication or interdict; *and it is further contended that the circumstance of calling the refusal an offence, showed that the punishment would be effective. And, thirdly, it has been contended that the vestry, being a deliberative body, did not resemble a body of electors assembled to perform a specific duty, but might exercise a discretion upon the subject as to which the vestry had been assembled to deliberate; and as to this third point, it has been remarked that,

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if the rate could lawfully be made by the minority, there would have been, long before this time, many instances of its being so made.

On the last of these points, which may be first considered, the case of *Methold v. Winne* (1) has been cited; but it does not support that proposition. No doubt, if the money wanted for the repairs of the church had been put on the table of the vestry by the persons then present, and, in like manner, if the churchwardens had sufficient money in their hands, and the inhabitants in vestry assembled authorized (as they might do) the churchwardens to apply these funds to the repair of the church, no rate could have been imposed, because none would have been required; but that does not show that the inhabitants in vestry assembled can resolve that the repairs shall be effected by any means which they please, or left without being effected at all. * * *

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This duty to provide for the repairs of the church existed at common law. The statute *Circumspecte agatis* (2) referred to it as an old practice. That duty was an original *charge on the land, and, till that statute, might have been enforced at common law. That fact of itself justifies the proposition, that this duty being imposed upon the parish, and the vestry being convened for the purpose of discharging it, that body has no power to deliberate whether it shall be discharged or not, but only in what way the necessary funds can be best raised. * * The case of the House of Commons is not in point, for the duty to raise supplies is a moral duty of imperfect obligation, not a legal duty which can be enforced by legal process. * * *

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Then as to the argument that, as the parties disobeying the law might be punished for not making the rate, there was no power in others to make the rate. It does not follow that, because parties are liable to be punished for acting in a certain manner, their acts are valid: yet such must be the argument maintained on the other side. It amounts to saying, "If the parties can be punished for refusing to make a rate, their refusal is operative:" in that is the fallacy of the argument. The refusal is not operative. * * In *Cooper v. Wickham* (3) there was nothing to show that the church was out of repair; there was, therefore, no duty required to be performed. The averment there was defective, and the case turned on that point. Here the fact of want of repairs is distinctly averred.

(1) 1 Rol. Abr. 393, tit. Churchwardens, A. pl. 3, c. 1.

(2) 13 Edw. I. c. 1.

(3) 2 Curt. Ecc. Rep. 303.

In *Francis v. Steward* (1), the insufficiency of the averment was likewise the ground on which the Court proceeded. * * Then comes the question whether the course of proceeding here, whatever may be the consequence to the parties who moved what is called the amendment, was not such as to make a valid rate. For such a purpose, was the vestry a purely deliberative body, or was it like an elective body? It cannot be said to be a purely deliberative body, for it has a fixed legal duty to perform. Admitting, on the high authority of the recent decision in this case, that it is not in the power of the churchwardens of themselves, as churchwardens, to make a rate, still it was open to the defendant in error to contend that, if the churchwardens were present in a vestry assembled, as this had been, to discharge an imperative legal duty, and if the other parishioners refused the rate, the churchwardens, being *parishioners then present in vestry, might make it. If so made, it would be lawfully made. In all the cases, the Courts assume everything in favour of the rate, because the making of it is a legal duty. Thus, in *Wayte v. German* (2), Lord Chief Justice NORTH treated the allegation that "the parish, or some of them, did rightfully make the tax," as showing that the rate was well made, and so prohibition was refused. The case of *Rogers v. Davenant* was cited by the other side from 1 Modern (3), but it was again reported in the succeeding volume (4). There the question was whether the Bishop's Commissioners might impose the rate, and the Court was unanimous that they could not, but added that "the churchwardens, by consent of the parish, are to settle the sums to be paid;" and said that "there may be a libel to pay the rates set by the churchwardens." The opinion there expressed is adopted by Degge (5), who expressly says that, "if the parishioners refuse or neglect to make the assessment, or refuse to meet, I conceive the churchwardens, having just cause for such assessment, may proceed alone;" and throughout the authorities there is nothing overruling the *dictum* in *Thursfield v. Jones* (6); and that that *dictum* was acquiesced in as expressing the law, is proved by the fact that, since then, the practice of the opponents of rates has been, not to refuse a rate altogether, but to vote one which was too small for the purpose required. * * *

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(1) 64 R. R. 698 (5 Q. B. 984);
S. C. 3 Curt. Ecc. Rep. 209).

(2) 2 Show. 141.

(3) 1 Mod. 194.

(4) 2 Mod. 8.

(5) Parson's Counsellor, part i. c. xii.
p. 165.

(6) 1 Vent. 367; the case is called
in the first edition *Anonymous*.

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Then as to this being the act of the minority, it is clear that, in many instances, the act of the minority would be valid. It is admitted to be the duty of the vestry to provide for the repair of the church, and that being so, the Court of Queen's Bench will grant a *mandamus* to compel performance of that duty. *Rex v. Wix* (1): There the *mandamus* was to meet and elect churchwardens.

(THE LORD CHANCELLOR: To whom could the Court direct such a *mandamus* ?)

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It appears there to have been directed to the parishioners liable to contribute to the church-rate, and that was done after the Court had looked into precedents. Suppose the inhabitants assembled under the orders of the *mandamus*; and suppose some of them to elect persons who were not parishioners, but the others to elect parishioners; though the former might be elected by the majority and the latter by the minority, the latter election would alone be good: *Oldknow v. Wainwright* (2). * * These cases are decisive of the principle. Then how is the effect of them got rid of? By insisting on a supposed distinction between cases of elective, or ministerial, and of deliberative bodies. But there is no such distinction; there can be no difference between voting for an unqualified candidate or for an unlawful proposition. *The Eynsham* case (3), cited in the Court below, is not an authority the other way, for there the proceedings were under the special terms of a local Act, but here the matter is regulated by the common law.

(LORD BROUGHAM: Suppose a 2*s.* rate, and then a 1*s.* rate, were proposed and put to the vote in succession, and a man voted against each, would not the sum and substance of his vote be equal to saying that there should be no rate at all?)

No; the law always presumes that a man will act legally. In each case the assumption would be that he voted against the sum proposed because he thought it too high.

(LORD BROUGHAM: Then your argument is, that if he said he voted against the 2*s.* rate because he thought there ought to be no rate at all, his vote, given for such a reason, would be no vote at all,—it would be lost?)

(1) 36 R. R. 545 (2 B. & Ad. 197).

(2) 1 Sir W. Bl. 229; 2 Burr. 1017.

(3) 12 Q. B. 398, n.

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No; the vote might be good, though the reason for it was bad. But if he stated that he came to the vestry for the express purpose of saying that he would not grant any rate at all, he would in effect declare his intention not to take any part in the proceedings of the meeting, and he must be accounted absent from it.

(LORD BROUGHAM: Suppose he said he would not vote for any rate, and then, on the proposition, of a 2s. rate, he voted against it?)

He would then be simply exercising his power to give a vote against that particular *rate.

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(LORD BROUGHAM: Then he might validly take part in the proceedings, though he gave a bad reason for his vote. Would not his general negative apply to each separate vote?)

That question assumes that he has power to give a general negative, but he has no such power. He may step by step refuse any rate,—that would be legal. But here the resolution was inapt to the business of the meeting, and was, therefore, wholly illegal and void.

(LORD BROUGHAM: Might he propose a rate of a farthing in every hundred pounds?)

The law would say that such a proposition was illusory.

Then as to the form of the averment in the declaration. The ordinary form is here followed; it is that the rate was made by “the churchwardens and others.” It is not necessary that a proposal for a rate should be put from the chair.

(THE LORD CHANCELLOR: But here it was put from the chair in the first instance, for an amendment was moved to it.)

Then it lies on the other side to show that the majority did not concur in making the rate. It was not necessary to put the question to the vote, if all who were resolved to negative any rate could be taken to be absent, for then the vestry would be unanimous. It is said on the other side, that it cannot be known from the record who made the rate; then, if so, it must be assumed to have been made by the majority, and there is no averment by the plaintiff in error that that is not the case.

What then is the result of the authorities? They show that the

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Bishop and his Commissioners cannot make a rate, nor can the Archdeacon, nor the Ecclesiastical Court, nor can the churchwardens, after the vestry has separated; but there is no case which shows that a rate made under the circumstances under which this rate was made, is invalid. *Thursfield v. Jones* (1) shows that it can be so made; and *in one (2) of the many reports of *Pierce v. Prouse*, which is reported in several places and under several names (3) Lord HOLT expressly says that, "if there be public notice given to the parishioners, and they will not come, the churchwardens may make a rate without them." Degge's authority is to the same effect; and in *Gaudern v. Silby* (4), the very thing which has now been done was declared valid and effectual. These authorities are confirmed by Johnson's Clergyman's Vade-Mecum (5), Watson's Complete Incumbent (6), Wood's Institutes (7), and Bacon's Abridgment (8), all of which show what has been the general impression among writers on these subjects. The course which has now been pursued is not, therefore, novel or without authority; it is in accordance with a settled principle of law, and is the only course by which a legal duty can be effectually enforced.

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Mr. Mellor [was heard] in reply. * * *

[The LORD CHANCELLOR proposed that certain questions be put to the Judges, giving his reasons for the questions suggested.]

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The following questions were put to the Judges:

1. Does the present record show the rate sought to be enforced to be an invalid rate?
2. Does such rate appear to be a valid rate?
3. Does prohibition lie against the enforcement of the said rate in the circumstances apparent upon the record?

The Judges requested time to consider these questions.

Ordered accordingly.

July 25.

MR. JUSTICE CROMPTON, after stating the facts of the case, said:

In order to answer the first question, it is necessary to consider

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|---|---|
| (1) 1 Vent. 367. | 389; <i>Price v. Rouse</i> , 12 Mod. 83. |
| (2) <i>Anonymous</i> , Comb. 344. | (4) 3 Curt. 272; Johnson's <i>Braintree</i> |
| (3) <i>Pense v. Prouse</i> , 1 Ld. Ray. 59; | case, 103. |
| <i>Pierce v. Prouse</i> , 1 Salk. 165; <i>Haw-</i> | (5) P. 17. |
| <i>kins v. Rouse</i> , Holt's Rep. 139; <i>Haw-</i> | (6) P. 389. |
| <i>kins v. Rouse</i> , Carth. 360; <i>Anonymous</i> , | (7) Pp. 88—90. |
| Comb. 344; <i>Hawkin's case</i> , 5 Mod. | (8) Tit, Churchwarden, C. |

under what circumstances, in what manner, and by whom this rate appears on the face of the proceedings in the Ecclesiastical Court to have been made; and then to consider the law as applicable to a rate so made.

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I find from the proceedings in the Ecclesiastical Court, as set out on this record, that on the 15th July, 1841, a vestry meeting of the parish of Braintree was duly held, *in consequence of a monition issuing from a court of competent jurisdiction, and requiring the churchwardens and parishioners, amongst other things, to make a rate for the repair of the parish church, which was out of repair. At that meeting a survey and estimate were produced, and not objected to, and a motion for a rate of 2s. in the pound was duly made and seconded. The motion was met by the amendment which has been so often read in the course of these proceedings, and which was carried by a great majority of the parishioners. The effect of this amendment is, that the vestry by a great majority refused to make the rate proposed, or any other rate, assigning for so doing reasons utterly destitute of any legal foundation, and acting contumaciously and in disregard of the legal obligation by which they were bound, and of the monition of a court of competent jurisdiction.

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The record proceeds to show that, whilst "the said parishioners still continued in vestry assembled," the question was put, whether any other amendment was proposed or any other proposition made as to the amount of rate; but that no such proposition or motion for discharging the obligation upon the parish was made, and that the majority having so refused, "the churchwardens and others of the parishioners then and there present in vestry, at the said meeting of the said parish, and whilst the parishioners so continued as aforesaid in vestry assembled, did rate and tax, and that the rate in question was then and there produced, made, and signed by the churchwardens and others of the ratepayers and parishioners then and there present." The rate, therefore, appears to have been made whilst the vestry-meeting continued, and whilst the refusing majority continued to constitute a part of that meeting; for it is distinctly stated to have been made whilst the said parishioners, that is, the whole of the meeting, continued so in vestry assembled; *and the rate was made by the minority, as and claiming to act as the minority, and treating the majority as no longer a part of the meeting; and not asking for, but in effect repudiating, the concurrence of the majority. If there were any doubts as to this, it is still more clear from the minutes, which

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are made part of the libel, and which show that, after the refusal by the majority, Mr. Veley, the defendant, addressed himself to those ratepayers who were willing to obey the monition, that is, to the minority, and proposed that a rate of 2s. in the pound should be made by them; and on that the mover of the amendment protested, on his own behalf and on the behalf of the meeting, against the irregularity and impropriety of the churchwardens attempting to make a rate after it had been refused by a large majority of the meeting; and protested also against the rate so attempted to be made. The rate is then set out, purporting to be made at a vestry by the churchwardens and other parishioners whose names are thereto subscribed.

It was argued by the counsel for the respondents at your Lordships' Bar, that these facts show that the majority retired from the discussion, and separated themselves from the meeting; that they said in effect, "We have conscientious scruples in the matter of church-rates, and cannot interfere in this discussion, and we leave it to you, the minority, to proceed and tax the parish if you choose." If they had so withdrawn themselves, no doubt the remaining minority would have constituted the vestry, would have represented the parish, and might have bound them by any rate they might have chosen to lay. But I come to the very contrary conclusion as to the result of the facts, and it appears to me that the majority remained in point of fact part of the meeting, refusing to make any rate, and struggling to the last against it, and that the minority did not affect to be making a rate assented to by the majority *in point of fact; but that they made the rate as the minority, and without proposing it to the general meeting, on the ground that the majority had forfeited their right to interfere by their declaration, and had in effect thrown away their right of voting. They claimed to make a rate, to raise the question suggested by the Court of Exchequer Chamber in the case of *Veley v. Burder*, and which I think they have raised by the course which they took. The real question, therefore, will be that which it was the object of these proceedings to raise, whether, when the majority of a vestry meeting has, on illegal grounds, contumaciously refused to make a rate for the necessary repair of the parish church, and which the vestrymen were required to make by the monition of an Ecclesiastical Court of competent jurisdiction, the churchwardens and minority can treat such majority as absent in point of law, and as giving no vote or opinion on the matter, although they were present in point of fact,

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resisting and struggling against the rate; and whether a rate so made, by such minority, without having or asking for the concurrence of the majority, is valid. It has been agreed on all hands in the course of the arguments and judgments in this case, and it is too well settled to admit of doubt or discussion, that the parishioners are liable to the repair of the body of the parish church. This liability is thrown upon them by the law and custom of England, differing in this respect from that of most Christian countries. It is equally clear, that whilst the parishioners are liable to repair the body of the parish church, any rate for such repairs can be imposed only by the majority of the parishioners in vestry assembled. This right of the parishioners to be rated only by a majority of themselves in vestry assembled has been asserted and recognized again and again, and does not, after the investigation and discussions which have taken place on this subject, admit of *any doubt. Whether the laying a rate is to be considered as taxing, or, as suggested at the Bar, as only distributing a legal burthen, it is clear in point of law that a church-rate can only be made by the majority of the parishioners in vestry assembled; and they are to proceed by making what has been called a bye-law or ordinance, for which purpose they are said to be in the nature of a corporation. Any attempt by the spiritual Courts or by any other parties than the majority of the vestry to impose a rate seems always to have been resisted with great jealousy; and it must now be assumed that neither the Ecclesiastical Court, nor the ordinary nor special Commissioners, nor the churchwardens, as such, can impose a church-rate, even when the vestry-meeting has contumaciously refused to make one. It is clear, on the other hand, both on the authorities and from recent discussions, that the majority of those who choose to attend may bind the whole parish, and that the churchwardens alone, if parishioners, in the event of no other parishioners attending a duly convened meeting, may themselves, as parishioners, constitute the vestry, and bind the parish. It must also be assumed that any parishioners attending the meeting, and refusing to take any part in the proceedings, may be treated as absent, or as not constituting part of the meeting for the purposes as to which they decline to interfere; and the proposition that the rate must be made by the majority has been properly qualified by being confined to the majority of those attending and taking part in the proceedings.

The question, therefore, comes to the narrow and simple point, whether the minority who laid the rate can, under the circumstances,

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be treated as the majority of the parishioners in vestry assembled who took part in the proceedings? Can it be properly averred that the rate in question was made by the majority of the parishioners *in vestry assembled, meaning by that phrase the majority of those who took part in the proceedings? In point of fact the majority of the parishioners in the vestry remained present, dissenting from the rate in question or any other rate, and the alleged rate was made by the minority, without uselessly putting the question to those who had declared and continued to declare against any rate; and the rate was laid by that minority claiming to constitute the meeting; and it is to be considered, whether the defendants have made out, either by direct authority or from analogy, that the misconduct of the majority had worked a forfeiture of their right to interfere, and had given the minority who wished to do their duty a right to consider themselves as constituting the meeting, to the exclusion of the contumacious majority, and that, to use the expression of the Court of Queen's Bench, at the end of the judgment, "the amendment was in effect a withdrawal of the majority from the meeting."

The defendants in error attempt to support the right of the minority to make a rate under circumstances like the present; first, on the ground of the authorities in the cases of church-rates, which have been so fully discussed in the arguments and in the judgments in the Courts below; and, secondly, and mainly, on the ground suggested by the Court of Exchequer Chamber, in *Veley v. Burder*, of the analogy between cases like the present and those of the election of corporate officers, when electors voting for an ineligible party with notice, or protesting and not voting at all, are held to have thrown away their votes. None of the authorities in the cases as to church-rates appears to me to bear distinctly upon the present question. They are very carefully examined, and put as strongly as they can be in favour of the defendant's case, in the judgment of Mr. Justice CRESSWELL in the Exchequer Chamber.

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They seem to *me, however, either to have proceeded on the ground that the churchwardens, as parishioners, might have constituted the meeting, "if none other of the parish would come together," or else to have proceeded on the ground, which must now be considered as bad law, that the churchwardens, perhaps, as being more directly liable to ecclesiastical proceedings, have the power to make the rate on the refusal of the parishioners. In none of these authorities is the question raised as to the minority

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having a right to treat the contumacious majority as having withdrawn from the meeting. In truth, that question was first suggested in the Court of Exchequer Chamber in *Veley v. Burder*. The reasoning of the Court of Queen's Bench, in the judgment in *Veley v. Burder*, is very strong to show that no such doctrine as that now contended for can be supposed to have prevailed in the earlier cases. It seems impossible to suppose that the illegal and unconstitutional courses alluded to in that judgment could have been adopted, if, on the refusal of the majority, the churchwardens or any individual parishioners could have made the rate at the meeting, on the ground of the rest having virtually withdrawn. The reasoning of the Court of Queen's Bench on this point will be found equally applicable to the present case as to that of *Veley v. Burder*, where the question was as to the right of the churchwardens to make the rate after the vestry meeting. The punishment of the majority for having obstructed the making of the rate, referred to by Mr. Baron ROLFE in his judgment, tends also to negative the supposition that it could have been considered as law in earlier times that the rate could be well made by a minority of the vestry who were willing to do their duty. It appears to me, therefore, that there is not only an entire absence of any distinct authority on this question in the cases referred to, but that there are strong reasons for disbelieving that such *doctrine has ever been acted upon or discussed, and the question must be considered as a new one. I think, therefore, that, in the absence of any distinct authority on the question, and considering the strong reasons for disbelieving that such doctrine has ever been recognized or acted upon, no reliance can safely be placed on this branch of the arguments for the defendants.

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It remains to consider the question suggested by the Court of Exchequer Chamber in *Veley v. Burder*, to raise which the present course of proceedings appears to have been adopted, and which I concur with the judgments below in thinking really and fairly arises on this record. This question is whether the rule of law referred to by the Exchequer Chamber as to corporate and other electors is applicable to the present case, and makes out the right of the minority to treat the majority as absent or as having withdrawn, or as having forfeited their right to interfere in the subject matter before the vestry. It is principally on the ground of the supposed analogy between this rule of law and the law as applicable to the present case, that the majority of the vestry is treat

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by the judgment of the Court of Queen's Bench as having virtually withdrawn from the vestry, and by the judgments in the Exchequer Chamber as being absent in spirit and point of law, though present in body, and as having thrown away their votes and forfeited their right of voting. The authority most relied upon for the defendants as to this part of their case is *Oldknow v. Wainwright* (1), in which case it was held that an election by the minority was good, when the majority dissented from the election, but voted for nobody else. Lord MANSFIELD in his judgment expressly relies on the fact of the majority not voting at all. It is not said, *or hinted at, that the majority had lost the right of voting by their illegal protest, or that they were to be punished for their misconduct by the loss of their votes, or that they ceased to form part of the meeting. On the contrary, their right to interfere in the election by the whole body is recognized; they are treated as continuing present as part of the meeting, but, as they did not take the only means of opposing the election of the party, which the Court declared was by voting for somebody else, or at least against the candidate, the votes really given constituted a majority for him. This case is far from establishing such a doctrine as that now contended for, that the minority in such cases may treat the majority, remaining present and continuing their dissent, as either absent or assenting.

These cases of corporate and other elections, the result of which depends on the relative majority of votes, and where the minority have either not voted, or have thrown away their votes by voting for an ineligible person, appear to me to furnish no analogy to a case where the act in question is to be done by the majority of the meeting, and where the majority, however illegally, refuse their assent, and dissent from the proposed act. It is the not voting for some eligible candidate, who might have the majority, and so exclude the other candidate, which has, in elections conducted in the ordinary way, the same effect as a forfeiture of the right to vote, or the acquiescence in the election of the other candidate. But when the election is not by voting for one candidate as against another, but a majority of the whole meeting is required for the election, no such result occurs, even in cases of election. Thus, in the case put by Lord CRANWORTH, of the election of the Speaker of the House of Commons, if the whole House, except one member, were to vote that they would do better without a Speaker, it would be absurd to say that the

(1) 2 Burr. 1017.

one member who was prepared to *do his duty, would have a right to consider himself as the House, to vote the rest absent, or treat them as having forfeited their right to interfere, and proceed to name the Speaker himself. It would be difficult, however, to mention a case where there would be a more strict duty to perform, or where the proceedings would be more contumacious, if, as supposed in the judgments in the Court below, the duty being an imperative one, or the contumacious nature of the misconduct, can affect the question. By the 92nd section of the Municipal Corporations Act, the town councils, in case of the borough fund not being sufficient, are authorized and required to lay a borough rate. Here there is a duty directly and expressly enjoined by Act of Parliament. Suppose that a majority of the town council should contumaciously refuse to lay any rate, admitting expressly that there is no other mode of raising the funds required for the purposes in the Act. Can it be said that a good borough rate could be laid by the minority, and that the 69th section, which directs that the majority shall decide, is to be repealed? The more correct rule was laid down in the case of *The Ratepayers of Eynsham* (1), with which I entirely concur, and which cannot, I think, be distinguished from the present case on the ground relied upon, of the majority being in one case required by the common law and in the other by statute. In either case an addition, for which I find no authority, is to be made to the common law or the statute, by the introduction of the qualification that, if the majority should refuse altogether to perform the duty, the minority may do it; and whether the majority is required for the validity of the act by a statute or by the common law, can, in my opinion, make no difference in this respect. I believe the real doctrine to be, that the majority so refusing *to perform the duty is to be punished, but that it cannot be legally held that the act is well done by the minority. I would ask what breach of duty, or what degree of contumaciousness, is to have the effect in question? Suppose that the majority should declare, before and at the vestry, that they will oppose any rate, and act on such declaration by negating every vote as it is proposed, is an inquiry to be made whether the conduct of the majority was contumacious, so as to give the right of proceeding to the minority? It appears to me to be a much sounder and wiser course to adhere to the plain rule of the statute or common

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(1) 12 Q. B. 398, n.

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law, requiring a majority for the validity of the act, than to introduce questions which may make the validity of the rate depend on an inquiry into the conduct of parties. It was much relied on in the judgments below, that the minority could not be compelled, by the breach of duty of the majority, to abstain from doing their duty; but, with great deference and respect to the learned Judges who took this view of the case, it seems to me rather a popular and rhetorical topic than a sound argument, to show that the minority could do the act required to be done by the majority. It assumes that the minority are prevented from doing the acts which it is their duty to do, by the illegal act of the majority, whereas it is the duty of the whole body, and not of the minority, to do the act. The minority are not prevented from performing any duty cast upon them, the minority; they do what they can, and are guilty of no breach of duty. The argument might be applied to every case of Commissioners, arbitrators, Courts, or other bodies, where the statute or common law, or the agreement of parties, renders the concurrence of the whole body or of a majority necessary. No authority has, however, been cited, and I believe that none exists, to show that in any such case as I have alluded to, the minority can *assume the power of acting, by reason of the contumacious refusal to act of the rest of the body. Suppose that a statute required a Court, consisting of four Judges, or required a majority of a body of four Commissioners, to do a particular act, and that three of them refused, either from misapprehension of the law, or contumaciously, and intending to disregard the law, can it be contended that the one Judge or Commissioner, who wished to do his duty, could act alone, so as to make the proceedings valid by reason of the dissent of the others? Yet in all these cases it might be asked, just as in the present case, how can the Judge or Commissioner, who is ready to do his duty, be prevented from doing it by the wrongful act of his fellows?

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I think, therefore, that in the present case, the right of the contumacious majority to interfere was not lost by their misconduct; but that they were entitled to vote for or against any rate which might be proposed, and they either were taken at the meeting to have so voted against each and every rate, as to make it unnecessary to put the particular rate again to them, or else the proceedings were faulty in the rate not being put to the meeting. In neither case does the rate seem to me to have

been imposed by the majority. I agree that no very formal mode of putting the vote was necessary, but I think it was not put to the majority because they had dissented from any rate that could be brought forward, and the minority then appear to me to have laid a rate themselves, without having or asking for the vote of the majority who protested against it.

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I think that such rate cannot, by any fiction of law, be deemed to be, what it is not in truth and in plain common sense, the rate of the majority of parishioners in vestry assembled. I therefore answer your Lordships' questions by saying that, in my opinion, the rate appears on this record to be invalid, that it does not appear to be valid, and *that prohibition lies against the enforcement of the rate in the circumstances apparent upon this record.

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MR. BARON MARTIN :

The questions which your Lordships require to be answered by the Judges arise upon a demurrer to a declaration in prohibition. The declaration is very long, but the substantial question which has been argued at the Bar of your Lordships' House is, whether a church-rate of 2s. in the pound, made on the 15th of July, 1841, in the manner stated on this record, at a vestry meeting of the parish of Braintree, in Essex, was a valid rate.

The facts alleged in the declaration, and upon which the validity of the rate depends, are these—(the learned Judge stated them very fully, and proceeded thus) : The question is whether this was a lawful rate. In the course of the argument, it was alleged that the vote of the majority was not against the rate at all, but was a mere affirmation of certain abstract opinions, and that the minority alone voted in respect of the rate. This is a question as to the true meaning of what is stated on the record to have taken place at the vestry. And to me it is clear that there was a direct vote of the majority not to make the rate. The amendment concludes with the allegation that the vestry refused to make a rate; and upon the amendment being carried, one of the churchwardens proposed to the ratepayers who were willing to obey the monition (or, in other words, to make a rate), that a rate should be made by them, and the rate was then produced, and was signed by the vicar, the churchwardens, and several of the ratepayers. The substance of the transaction, therefore, was, that the majority refused to make the rate, and the minority made it; and the protest at the

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conclusion of the proceedings against the rate, satisfactorily proves that this was what was meant and understood *by the vestry,—and I think it raises the substantial question in controversy between the parties, viz., Assuming a church to be out of repair, and a vestry of the parishioners legally called together and assembled for the purpose of providing for the repairs, can the churchwardens and a minority of the vestry impose a legal church-rate upon the parish, in opposition to the votes of the majority? In my opinion, this also disposes of the second point made on behalf of the plaintiffs in error, viz., that it does not appear that the minority made the rate. I think it does sufficiently so appear.

Before proceeding to the consideration of the main question, there are some preliminary matters which are necessary to be ascertained. 1st. Did the monition from the Ecclesiastical Court, of itself, create any additional obligation upon the parishioners to make the rate? No authority was cited to show that it did. And it appears to me that its real operation was the more satisfactorily to establish the necessity for the repairs, and the more directly to bring the parishioners under the cognizance of the Ecclesiastical Court. In my opinion, the legal obligation of the parishioners remained the same as before, neither greater nor less. 2ndly. What is the legal obligation of the parish? And I have no doubt that it is “to keep the church in repair.” It is, as stated by Chief Justice NORTH, in *Rogers v. Davenport* (1), and in Ayliffe’s *Parergon* (2), analogous to the liability to repair a bridge or a highway; and should it become necessary to aver in pleading the legal liability of the parish, it would, in my opinion, of necessity be alleged as the duty to repair the church, and not to make a rate, in like manner as the legal duty of a parish must be averred to be to repair the highway, not to make a rate for the *purpose. 3rdly. What is the true nature of a church-rate? In *The Chamberlain of London’s* case (3), Lord COKE lays it down expressly “that it is an ordinance or bye-law which the parishioners have a right to make at common law, without any custom, and that the greater part may thereby bind the whole.” In the before-mentioned case of *Rogers v. Davenport*, three of the Judges say the same, and Ayliffe also so states the law. It therefore seems to me clearly established, that a church-rate is of the nature of a bye-law, and that thereby the persons liable to the duty of making the repairs decide, amongst themselves, that the mode of

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(1) 1 Mod. 194.

(2) P. 452.

(3) 5 Co. Rep. 63 a.

performing the common obligation which they elect to adopt is to raise a sum of money by a rate. And in my opinion the parishioners, and they alone, are competent to make this election; and if they determine to effect the repairs in any other manner, as by their personal labour, they may legally do so, in the same manner as the inhabitants of a parish might at common law have repaired a highway, or the inhabitants of a county might have repaired a bridge. It is quite true, that for many years a rate has been generally, if not universally, resorted to for the purpose, as the most convenient and equal mode of performing the duty; but before the time of legal memory, when the obligation arose, I have no doubt that the effecting repairs by a rate, was a thing almost unknown in country parishes, although in large towns a rate was probably resorted to; rents were then almost universally paid in kind or by personal services, and I have no doubt that rates were so paid also.

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As to the main question itself. It is upon all sides acknowledged that the law of England is most careful to protect the subject from the imposition of any tax except *it be founded upon and supported by clear and distinct lawful authority. In the first of the cases which arose out of the controversy in the parish of Braintree, viz., *Burder v. Veley* (1), the Court of Queen's Bench, in delivering judgment, stated, "That the law requires clear demonstration that a tax is lawfully imposed." And the same doctrine is distinctly laid down in *Denn v. Diamond* (2), and in a variety of other cases. Indeed it is a legal axiom. It is clear, therefore, that the defendants in error who support the present rate, ought, in order to maintain it, to adduce some legal authority or judgment, or at least the opinion of some eminent writer upon the subject in their favour. But it is singular that, although in the previous arguments and judgments in the Court of Queen's Bench and the Court of Exchequer Chamber upon the *Braintree* cases, every authority and opinion and *dictum* of every kind which exist were brought forward, yet until the judgment in the last of these cases suggested it, it never seems to have occurred to the mind of any one that the minority of the parishioners at a vestry could make a rate, in opposition to the vote and determination of the majority.

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In the reigns of King Charles the First and King Charles the Second, the Ecclesiastical Courts in several cases decided that the churchwardens alone could make a rate when the vestry refused; but in all these cases the making of the rate, and its validity, were

(1) 12 Ad. & El. 247.

(2) 28 B. R. 237 (4 B. & C. 245).

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grounded, and attempted to be supported, upon the supposed authority and liability of the churchwardens as public officers of the parish (who were alleged to be personally responsible in regard to the non-repairs of the church) to make the rate; and until the *Braintree* cases it was never surmised by any one that the votes of the minority of the vestry at all aided towards its legality.

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*This supposed power of the churchwardens *ex officio* to make a church-rate has been on several occasions expressly adjudged to be contrary to law by the Courts at Westminster, and it is stated so to be in the treatises of the most learned writers on ecclesiastical law, viz. Gibson and Ayliffe; and I believe no authority can be found, certainly none has been cited, that at a public meeting called to impose a church-rate, or indeed a tax of any kind, the minority of the meeting may vote it in opposition to the votes of the majority. If it is so in the present instance, it is an anomaly, and requires a clear and cogent legal authority to support it. The only alleged authorities cited for the purpose by the learned counsel for the defendants in error were *Thursfield v. Jones* (1), *Gaudern v. Silby* (2), decided in 1799 by Sir W. WYNN, the Dean of the Arches, and a passage in the Parson's Counsellor (3) by Sir Simon Degge.

The case of *Thursfield v. Jones* was a motion to the King's Bench for a prohibition to the Ecclesiastical Court in a suit for a churchwarden's rate, suggesting that the parties applying for the prohibition had pleaded that the rate was not made with the consent of the parishioners, and that the spiritual Court had refused the plea. The report then proceeds thus: "The Court said that the churchwardens (if the parish were summoned, and refused to meet or make a rate), might make one alone for the repairs of the church (if needful), because that if the repairs were neglected the churchwardens were to be cited, and not the parishioners, and a day was given to show cause why there should not go a prohibition." It is stated in the judgment of the Queen's Bench (4), that search had been made in the books of the Courts for this case, which occurred in 35 Charles II., but nothing could be found concerning it. And with respect to it, it is to be observed that it is not a judgment of the Court at all, but a *dictum*, which, if really made by the Judges in Court, and considered by them to be the law, ought to have induced them to refuse the rule to show cause, instead of granting it; but assuming what is said to have fallen from the Court to be correctly

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(1) 1 Vent. 367.

(2) 3 Curt. 272.

(3) P. 204.

(4) 12 Ad. & El. 251.

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reported, it is entitled to no weight; for it is in direct contradiction to a prior judgment of the Court of King's Bench in 8 Charles I. (1628), *Roberts'* case (1), and to the judgment in *Rogers v. Davenant* (2), in 26 Charles II., a few years before; and the subsequent judgment in the Queen's Bench in Banco, in the case of *Pierce v. Prouse*, 7 William III. (3), is directly to the contrary, and must, therefore, according to the ordinary mode of dealing with cases at law, be taken to have overruled it. Indeed one would suppose that a *dictum* or expression of opinion falling from a court of law upon an application for a rule to show cause bears with it about as little weight of judicial authority as it is possible that anything falling from a court of law can bear; and Chief Justice TINDAL, in delivering the judgment of the Court of Exchequer Chamber in *Veley v. Burder* (4), was well warranted in saying that the case was extremely unsatisfactory. But, as regards the present question, it has really little bearing, for the opinion of the Court was in express terms in regard to a rate made by the churchwardens alone, and not in regard to one made by a minority of the vestry.

The case of *Gaudern v. Silby* (5) was a decision in the Arches by Sir W. WYNN, in 1799, that the churchwardens, *upon a refusal by the vestry to make a rate, had by law power to make one. This case was much considered in the original proceedings in the present case in the Ecclesiastical Court, and also in the Court of Queen's Bench in *Burder v. Veley*. Dr. LUSHINGTON, in giving the original judgment upon the subject, spoke of it as follows (6): "I may observe upon this case that I believe its appearance was a surprise upon the whole profession. It certainly was not known to the Ecclesiastical Commissioners, or at least not recollected by any member of that Commission, when the subject was then discussed, and during the thirty years that I have been in these Courts I never knew that case adverted to, nor was I aware until lately that such a case was in existence, although it is of forty years' standing." And the Court of Queen's Bench, in delivering judgment, expressly declared it not to be law. And it is to be observed, 1st, that the decision is nothing more than a revival in 1799 of the same doctrine which the spiritual Court advanced in the reigns of Charles I. and II., of the power of the churchwardens to make a rate,

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(1) Hetley, 61.

(2) 1 Mod. 194—236, pl. 2.

(3) 1 Salk. 165. See *ante*, p. 330,

n. (3).

(4) 12 Ad. & El. 307.

(5) 3 Curt. 272.

(6) *Braintree Church-rate case* (by Johnson), 78.

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which was expressly adjudged not to be law in several cases by the Courts at Westminster Hall; and, 2ndly, that there is not a word to be found in it as to the authority of the minority of the vestry.

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The third and only remaining authority relied on by the learned counsel for the defendants in error is a passage from Degge's Parson's Counsellor (1). (His Lordship read it, see *ante*, p. 327.) The above is the entire passage, and certainly it does not seem to indicate that the writer had a very strong opinion upon the subject, and it would be strange if he had had; for of the authorities cited by him, viz., an *Anonymous* case (2), to which I shall hereafter refer, **Rogers v. Davenant* (3), *Roberts' case* (4), and *Thursfield v. Jones* (5), before mentioned, none of them, with the exception of the latter, at all justifies his supposed view, and two of them are in direct contradiction to it. The reason also given for it, viz., "That the churchwardens may be compelled themselves to do the repairs," does not seem to be well founded. No authority was cited to establish such liability; and it was observed by the Court of Queen's Bench in the judgment in *Veley v. Burder* (6), that unless the churchwardens have supplies they are not personally liable; but, as I have already observed, the plain and patent objection to these supposed authorities upon the present question is, that they are not at all directed to the alleged power of the minority to make the rate, but to the power of the churchwardens alone, which power has been expressly negatived by several adjudged cases by the Court at Westminster Hall.

To my mind the absence of any authority in support of the doctrine that the minority has power to make a rate ought to be conclusive against it; but I think there are numerous authorities which show that no such power exists. It was observed by the learned counsel for the defendants in error, that these authorities are only affirmative, viz., that the majority may make a rate; and that there is nothing negative that the minority may not do it when the majority has refused. I think this is an error, as, in my opinion, several of the authorities are to the effect that the major part, and they alone, can make the rate. But it seems not correct reasoning, when it is laid down in plain affirmative language how a thing is to be done, to allege that the thing may be done in a

(1) P. 165.

(2) 1 Mod. 79, pl. 41.

(3) 1 Mod. 194, 236, pl. 2.

(4) Hetley, 61.

(5) 1 Vent. 367.

(6) 12 Ad. & El. 250.

different manner, because such manner is not in express terms negatived. *The first authority relied upon by the learned counsel for the plaintiffs in error was *Jeffrey's* case (1). Lord COKE there states that the Court of King's Bench required the opinion of the professors of ecclesiastical law in regard to the question of church-rates, and that divers of them certified under their hands in writing, "That the churchwardens and greater part of the parishioners, on a general warning met together, might make such a tax by the law." Now, with great respect for those who have expressed a different opinion, I think Lord COKE clearly understood, and meant it to be understood by others, that the legal mode of making a church-rate was by the churchwardens and the greater part of the parishioners assembled together by public notice at a public meeting; and that he meant to negative any other mode of making the tax.

The next case was *Roberts' case* (2), 3 Charles I. The inhabitants of Greenwich had sentence given against them in the spiritual Court to pay a church-rate made by the churchwardens. They appealed to the Arches, and the sentence was confirmed. They then applied to the Court of King's Bench for a prohibition, and it was granted. The report stated, that the COURT agreed that the tax cannot be made by the churchwardens; but by the greater number of the parishioners it may. This is one of the cases referred to by Sir Simon Degge in the passage above referred to; it is obvious that, so far from justifying his view, it is directly to the contrary. It is also the first of several cases reported in the Common Law Reports in which the Ecclesiastical Courts in the reigns of the Stuarts seem systematically to have decreed for payment of church-rates made by the churchwardens alone. The courts of common law, however, with the exception of the *dictum* in *Thursfield v. *Jones* (3), uniformly denied their legality; and after the case of *Pierce v. Prouse* (4), 7 William III., the spiritual Courts appear to have abandoned the doctrine, until the decision in *Gaudern v. Silby* (5), in 1799, which, however, according to Dr. LUSHINGTON, has not been acted upon since.

The next case cited in order of time was *Anonymous* (6), 23 Charles II.; and, except that it is referred to by Sir Simon Degge as an authority for the passage before mentioned, it would not be worth

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(1) 5 Co. Rep. 67.

(2) Hetley, 61.

(3) 1 Vent. 367.

(4) Salk. 165.

(5) 3 Curt. 272.

(6) 1 Mod. 79, pl. 41.

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quoting. The following is the whole of it: "Counsel moved for a prohibition to the spiritual Court, for that they sue a parish for not paying a rate made by the churchwardens only, whereas by law the major part of the parish must join. TWISDEN, Justice: Perhaps no more of the parish will meet together. Counsel: If that did appear it might be something." A case so reported is really worthless as an authority; but at the utmost it amounts to this: the counsel stated the law to be, that the major part of the parish must join in making the rate. The Judge then observed, that if no more of the parish than the churchwardens would come to the meeting, the latter would have power to make it; and according to what fell from the Court of Queen's Bench and Exchequer Chamber this might be so, for the churchwardens would then be the legal vestry, and the majority of the vestry can make the rate.

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The next case is *Rogers v. Davenport* (1), 26 Charles II., which is universally referred to as the leading case upon the subject. The report merely gives the judgment of the Court. (His Lordship read it.) Now this case seems to me a direct authority that the majority alone can make the *rate; for the parishioners who are willing to contribute are not to make a rate, but are to be absolved; and every one of those who are not willing is to be excommunicated until the greater part of them (or, in other words, the majority) shall agree to assess the rate. The case, therefore, clearly shows that the majority alone can make the rate, and that the dissentients are to be coerced until a majority shall make it. The case also confirms Lord COKE's doctrine, that the rate is in the nature of a bye-law.

The next case is *Saint Mary Magdalen, Bermondsey* (2), 29 Charles II. The report consists of several resolutions, and I have no doubt they were the resolutions of the Judges in the Court of Exchequer Chamber; the Court of the highest authority in this kingdom, next to that of your Lordships. The report, as regards the matter now in question, is as follows: "In a prohibition it was the opinion of the whole Court, that if a church be out of repair, upon a general warning or notice given to the parishioners, the major part then present, and meeting according to such notice, may make a rate. The Bishop or his Chancellor cannot set a rate upon the parish; it must be done by the parishioners themselves." Now this seems to me to be not merely affirmative that the major

(1) 1 Mod. 194, and see 236, pl. 2.

(2) 2 Mod. 222.

part present can make a rate, but a clear declaration of the COURT that the mode, and the only mode, of making a church-rate, is by the majority of the parishioners meeting together in pursuance of a notice.

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The next case is *Wayte v. German* (1), 32 Charles II. It was a motion for a prohibition. The counsel (*Baldwin*), in moving for the rule, admitted that in case of necessity the major part of the parish could bind the rest; but argued that in the libel it was not alleged that the *major part had made the rate. To this Chief Justice NORTH answered, "It is said that the parish, or some of them, did rightly make the rate; and can that be understood otherwise than of the major part? And if but forty of the parish appear, the major part may tax the whole." Mr. Justice CHARLTON said, that the best objection to the rate was that the libel did not state absolutely that the major part agreed to the tax; and Mr. Justice LEVINZ doubted, because the libel did not expressly declare that the major part consented, and desired to have the libel amended; but Chief Justice NORTH and WYNDHAM were of opinion that it was well enough, since it was alleged "that the rate was rightly made," and the prohibition was refused. The reporter, Sir Bartholomew Shower, seems to have concurred with Mr. Justice LEVINZ, for he adds, "*Sed quere Legem.*" Now this again is a direct authority that the majority must concur, and that it must so appear on the libel. Mr. Justice LEVINZ thought it must appear expressly; the other Judges thought it sufficient if it appeared by necessary implication, and that it did so appear when it was averred that the rate was rightly made, or, in other words, that to make the rate rightly the majority must concur.

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The next case in order of time is *Thursfield v. Jones* (2), 35 Charles II., which is relied on by the defendants in error, and which I have already mentioned; and the last and concluding one is *Pierce v. Prouse* (3), 7 William III., reported in a great number of other books by this name, and also by other names, *Hawkins v. Rous*, *Pierce v. Prouse*, &c. (3); but in which all are agreed that the COURT adjudged that the parishioners, and not the church-wardens, ought to make the rate. This was after the Revolution, *and seems to have ended the controversy until 1799, when Sir W. WYNN decided *Gaudern v. Silby* (4), when again the question

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(1) 2 Show. 141.

n. (3).

(2) 1 Vent. 367.

(4) 3 Curt. 272.

(3) 1 Salk. 163. See *ante*, p. 330,

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seems to have slept until it was revived in the cases arising out of Braintree parish. These, I believe, are all the authorities upon the subject, and the result seems to be, that originally the opinion was that the major part of the parishioners assembled at a meeting in pursuance of notice were the proper parties to make the rate; that in the time of the Stuarts the spiritual Courts, in several instances, decided that the churchwardens alone could make it; that this doctrine was steadily resisted by the Courts of Westminster Hall, and apparently set at rest by the case of *Pierce v. Prouse*, in the year 1695; that in 1799 Sir W. WYNN, the then Judge of the Arches, anew asserted the right of the churchwardens to make the rate; but that on the first occasion when this doctrine was brought under the cognizance of the Court of Queen's Bench, in *Burder v. Veley* (1), that Court, in the most explicit terms, adjudged it to be contrary to law, which judgment was affirmed in the Court of Exchequer Chamber, and no writ of error brought thereon to this House.

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In addition to these cases there were cited on behalf of the plaintiff in error passages from two works of great authority upon ecclesiastical law, viz., Gibson's Codex, and Ayliffe's Parergon. The law is thus laid down in Gibson (2): "Rates for the reparation of the church are to be made by the churchwardens together with the parishioners assembled upon public notice given in the church, and the major part of them that appear shall bind the parish, or if none appear the churchwardens may make the rate, because they, and not the parishioners, are to be cited and punished *in default of repairs; but the Bishop cannot direct a commission to rate the parishioners, and appoint what each shall pay. This must be done by the churchwardens and parishioners, and the spiritual Court may inflict spiritual censure until they do."

In Ayliffe (3), the law is thus stated: "The spiritual Court may compel the parishioners to repair the parish church if it be in decay or out of repair, and may excommunicate every one of them, severally, until the greater part of them do agree to assess and levy a tax for the repair thereof, and such as are willing to contribute thereto shall be absolved. The churchwardens cannot themselves impose a tax for the repair of the church, but the greater part of the parish may make a byelaw, and to this effect they are a corporation. If a church be fallen down, and the parishioners are so increased that

(1) 12 Ad. & El. 233—265.

(3) P. 452, and the following pages.

(2) 1 vol. tit. 9, c. 4, s. 2.

of necessity they must have a larger church, a tax may be raised by the major part of the parish as well for enlarging it as for repairing it. Nor is the consent of every parishioner necessary to the imposing a tax in such case for enlarging the church, for the greater part of the parish shall control the less for enlarging a church as well as for repairing it." Ayliffe also in other places uses the expression "greater part of the parish," and in commenting upon the punishment upon persons refusing the rate he speaks of them as "severally culpable." It is quite clear that both these writers deny the power of the churchwardens to make a rate in the sense in which Sir W. WYNN held they had such authority in *Gaudern v. Silby*. And to my mind the passage in Gibson clearly shows that he had no idea that the minority at a vestry could overrule the majority, but, on the contrary, that the major part of the parishioners *or those alone who attended could make the rate. But as to the passage in Ayliffe there is no room for doubt; he uses the clear and unambiguous expression, "greater part of the parish," and he says, "the greater part of the parish shall control the less," and he speaks of the persons refusing the rate as severally culpable, and that the persons willing to make the rate shall be absolved, and that the spiritual Court shall excommunicate every of them severally until the greater part of them do agree to make the rate. He, therefore, clearly negatives the power of the minority to make a rate; for, according to the law as laid down by him, each of the refusing majority may be severally excommunicated, and thereby coerced, until the greater part of the parish shall agree, which is utterly inconsistent with the idea that the willing minority can of itself make a valid rate. Ayliffe's book is stated, by Lord Chief Justice TINDAL, in the judgment of the Court of Exchequer Chamber in *Veley v. Burder*, to be one of high authority. I am, therefore, of opinion that the above are direct authorities that the minority of the vestry has not power to make a church-rate; and there is not, I believe, the slightest intimation or suggestion to be found anywhere, before the discussion on the *Braintree* cases, that such power exists. The power so long contended for by the Ecclesiastical Courts was not for the minority of the vestry to make the rate, but for the churchwardens alone, by virtue of their office, and by reason of their being personally responsible in respect of the non-repair; and in my judgment the authorities before cited ought to be conclusive upon the present question.

But the rate was also alleged to be lawful upon abstract reasoning.

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It was argued that unless this was a lawful rate the greater number of the parishioners would have compelled the others to do an unlawful act. I think this is *a fallacy. Assuming that the legal duty of the parish was to make a rate, the minority did no unlawful act whatever. The majority acted unlawfully, and every one was liable to be punished in the Ecclesiastical Court in such manner as the law provides; but the minority did nothing unlawful, and was liable to no punishment whatever. The case of *Rogers v. Davenant*, and the passage in *Ayliffe*, are conclusive upon this point. If this reasoning is correct, the consequence would be that, assuming the church to be out of repair, and a vestry called, the churchwardens and one parishioner, indeed the churchwardens alone, they being members of the vestry, or even one churchwarden against the will of the other, could make a rate in opposition to all the rest of the parishioners; for if the doctrine is correct that the acts of the majority are to be deemed null, and they therefore are to be considered as absent from the vestry, and not voting at all, the person or persons voting for the rate would alone constitute the vestry.

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It was also urged that an analogy in favour of the rate was afforded from the proceedings of constituencies for the election of members of Parliament and of corporate meetings for the election of officers. But I think the proceedings for the election of members of a representative body or of corporate officers are substantially different from the proceedings of the body itself in the transaction of its business. In *Rex v. Monday*, Lord MANSFIELD says (1), "Upon the election of a member of Parliament, when the electors must proceed to an election because they cannot stop for that day or defer to another time, there must be a candidate or candidates; and in that case there is no way of defeating the election of one candidate proposed but by voting for another. But in the business of corporations it *is a different thing." At an election, by common law it is only necessary that there should be a majority for one candidate over every other candidate. There may be as many candidates as there are electors, less one, and the votes of two would carry the election, however numerous the electors, if all the others voted for separate candidates, and the vote of one would be a lawful election if no other elector voted. But, as remarked by Lord MANSFIELD, voting in the business of the body is a very different thing, and I apprehend it is clear law, and exemplified

(1) Cowp. 538.

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every day in the proceedings of your Lordships' House, and of the House of Commons, and of corporate bodies, that for the transaction of business, viz., making a law, imposing a tax, making a bye-law, in fact, transacting any business whatever, there must be, 1st, a lawful meeting; and, 2ndly, a vote of the majority; and unless the majority vote for the law, tax, or bye-law, it is not carried.

The cases cited of *Oldknow v. Wainwright* (1), *Taylor v. The Mayor of Bath* (2), and *Rex v. Hawkins* (3), are all instances of the same principle; and further, that if a candidate be legally disqualified to fill the office, votes given in his favour, after notice of the disqualification, are thrown away, and as if they had not been given at all. But no instance has been cited of the principle being applied to the transaction of business. In my opinion, therefore, neither this analogy nor abstract reasoning supports the rate. The persons constituting the majority of the vestry were free agents. If they have acted illegally they are liable to be punished in such manner as the law directs; but it would be, in my opinion, contrary to law to hold that any tax can by the common law be imposed by a public body unless the majority of the body present at *a lawful meeting shall vote for it. In very early times the spiritual Courts obtained jurisdiction in respect of the repairs of churches, and the Statute *Circumspecte Agatis*, 13 Edward I., clearly shows that the controversy then was, not as to the making of rates, but whether the Ecclesiastical or the temporal Courts had jurisdiction in respect of them. The parishioners were then all of one faith, and as their duty was to repair the parts of the church where they themselves sat, it might be and was well left to the majority to make provision for their own accommodation. The Ecclesiastical Courts succeeded in obtaining exclusive jurisdiction on the subject, and they then possessed the most effectual powers of enforcing it that were probably ever enjoyed by any legal tribunal, viz., interdict in the event of the whole parish being contumacious, and the excommunication of individuals refusing to repair. In the progress of time these means of enforcement have become inefficacious, and the consequence is the same which has occurred in very many other instances from the same cause, viz., that recourse must be had to the Legislature; but, in my opinion, a court of law has no power to administer a remedy.

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In answer to the questions put by your Lordships, I have

(1) 1 Sir W. Bl. 229.

(3) 10 East, 211.

(2) 3 Luters, 324.

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therefore to reply, that in my opinion the present record does show that the rate sought to be enforced is an invalid rate.

2ndly. That the rate does not appear to be a valid one; and,

3rdly. That prohibition lies against the enforcement of the rate in the circumstances apparent upon the record.

[Mr. Justice TALFOURD expressed the opinion that the rate did not appear to be invalid, but that it did not necessarily appear to be a valid rate, and answered all the questions in the negative.

Mr. Justice WILLIAMS and Mr. Justice ERLE agreed with Mr. Justice CROMPTON and Mr. Baron MARTIN that of the three questions proposed the first and third should be answered in the affirmative, and the second in the negative.]

[751] MR. JUSTICE WIGHTMAN :

As it appears to me that the church-rate now in question between the parties is a valid rate, it will not be necessary for me to give separate answers to the questions proposed by your Lordships.

[*752] Of the four Courts before which the case has been considered, the judgment of three has been in favour of the validity of the rate ; but in the last of these, that of the Exchequer Chamber, the Court was not unanimous, four of the Judges, out of seven who composed it, being of opinion that the rate was valid, whilst three were of a contrary opinion, and considered the rate invalid, for reasons given in their several judgments, and which, as it seems to me, contain every argument that great learning and experience could suggest in support of the view of the question which they have taken. And in fact the whole subject *is exhausted, by the several judgments that have been given by the learned Judges who composed the Court of Exchequer Chamber, and which are now before, and under the consideration of your Lordships ; and the opinion that I now offer to your Lordships is founded mainly upon a consideration of those several judgments. (His Lordship here stated the facts of the case.)

It appears to me that the majority who supported the amendment must be understood as refusing to make any rate whatever, and not as objecting to the amount or terms of the rate proposed, and that it was, therefore, as far as they were concerned, quite unnecessary again to put the question with regard to the particular rate, and that it would have been merely futile to have done so.

Indeed, the question was asked, whether any other rate was proposed, and no answer was given. I also think that it sufficiently appears, by reasonable intendment, though not precisely stated, that the rate was made by all of those present who were willing to make a rate at all, or at least by a majority of them, though the whole might be, and indeed were, a minority of those present at the vestry; in short that those who concurred in making the rate were a minority, as compared with those who refused to make any rate at all. It may be considered as now settled, that there is a legal obligation upon the parishioners to repair the body of the parish church, and to provide things necessary for the performance of Divine service therein; indeed, that is not disputed in the present case; but there is some difference of opinion as to the legal means of fulfilling that legal obligation, where its fulfilment is resisted. It is said that, although the parishioners are bound by law to repair the church, and to provide all things needful for Divine service, and may, if they please, do so by means of a rate, they are not obliged to take that course, but may adopt *any other that will suffice for the purpose. It is not easy to suggest a mode by which the obligation to repair the church, and provide other things needful, can be discharged by the parishioners, as a body, otherwise than by a rate. Benevolent individuals may voluntarily undertake the whole charge, or individual parishioners may agree to supply particular portions of the work amongst them, but performance of such work cannot be imposed upon or enforced against individual parishioners by any order or bye-law made by the vestry. The only practicable mode in which the legal obligation cast upon the parishioners as a body, can be fulfilled by them as a body, is by a rate. If, indeed, the churchwardens, as such, are possessed of goods belonging to the church, they may, by assent of the parishioners, dispose of such goods, and employ the proceeds for the necessary service of the church, as was decided in *Methold v. Winne* (1). But the mode of disposal is only an excuse for what would otherwise be a breach of duty; and that case by no means warrants the conclusion, that the property belonging to the church might in the first instance be disposed of by the parishioners in vestry, for the repair of the church, though the minister and churchwardens should be unwilling. I apprehend, then, both from authority and the practice of ages, founded, no doubt, upon necessity, that the only mode by which the parishioners, as a body, can fulfil

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(1) 1 Rol. Abr. 393, tit. Churchwardens.

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their legal obligation to repair the church, is by a rate, and that the making such rate is as much a legal obligation upon them as that of the repair of the church. The monition, indeed, calls upon them in terms to make a rate, and the vestry is summoned for that express purpose. What, then, is the nature of that rate which the parishioners are required to make for the reparation of the *church? The late LORD CHIEF JUSTICE, in delivering judgment in the case of *Veley v. Burder*, referred to a case cited from the Year Book, 44 Edw. III., as establishing the fact that church-rates were made by the parishioners at so early a period as the year 1370, and showing that such a custom existed beyond the time of legal memory, and was no other than the common law of England. Such a rate, or rather the order for it, is said in that case, and also by Lord COKE, in *The Chamberlain of London's case* (1), to be in the nature of a bye-law, and for this purpose, as appears from the case of *Rogers v. Davenport* (2), they are a corporation. If, then, the church is out of repair, and there is no church property available, as in *Methold v. Winne*, the parishioners, who are bound to repair it, can only do so by means of a rate, to be made pursuant to an order or bye-law of the parishioners assembled in vestry; and the power of the parishioners, with respect to such order or bye-law, differs from the powers usually possessed by corporations; the inhabitants of the parish cannot by law refuse to make an order or bye-law for a rate when the church is out of repair, and a monition is issued to compel them to repair it, and to assemble in vestry, and make a rate or bye-law for that purpose. The terms of the order or bye-law, as to the amount, may indeed be within their discretion, but not the making or refusing to make it altogether.

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In the present case the majority of the inhabitants refused to do what the law requires. The question was not whether the proposed rate or bye-law was proper, if any was made, but whether there should be any at all; and the majority resolved that there should be none. What, then, is the minority to do? Or, rather, what are they to do *who are willing to obey the law, and make a rate? I cannot but think that there is some fallacy in taking in too strict a sense the term "bye-law," as used in speaking of the rate to be made for the repair of the church, and applying to it the rules of law that regulate the making of bye-laws by corporations in general. It is said that no bye-law of a corporation can be made but by a majority. No doubt that is so, there being no legal obligation upon

(1) 5 Co. Rep. 63, a.

(2) 1 Mod. 194.

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the corporation to make it, and no breach of legal duty in refusing to do so ; but there is a wide distinction between the making such a bye-law and a church-rate, which it is obligatory on the inhabitants to make, and contrary to law to refuse. If the majority could bind the whole, they would make the willing minority parties to their illegal refusal, and subject them to the legal consequences of such refusal. It may be, that the majority might not much regard the illegality or the consequences ; but the minority may be unwilling to act illegally, and may dread the penalty. Is there, then, any principle known to our law which can be applied to such a case, and by the aid of which the consequences of the refusal of the majority to act according to law may be avoided, and the monition, which it is not disputed was legally issued, obeyed.

The inhabitants were summoned to a vestry to perform a particular duty required of them by legal authority. The majority of those who attended refused to perform that duty, and their presence was useless ; it was in effect the same as if they had stated that they would take no part in making a rate, which was the business for which they were summoned. I cannot distinguish, in principle, this case from that of a corporate meeting summoned, in pursuance of a *mandamus*, to elect a corporate officer. Suppose that only one person is proposed to fill the office, and he perfectly eligible, but that the majority resolve that they will *not elect anybody, and this without objecting to the person proposed, or bringing forward anybody else ; the minority may elect in such a case. The case of *Oldknow v. Wainwright* (1) is an authority for this, which indeed has not been questioned. The vestry can hardly be called a deliberative assembly for the purpose of making a rate when the church is out of repair, and the parishioners are called upon by competent authority to make it ; for they are bound by law to make one. They may be and are deliberative as to the amount of the rate, but not as to the making any. It is not denied that a valid rate can only be made by an absolute majority of those who are willing to make a rate at all, and that a relative majority is insufficient. If three different amounts of rate had been proposed, that which had the greatest number of votes could not have been maintained unless such number proved a majority of the whole who voted. No question of that kind, however, arises in the present case. The only question at the vestry was between a rate of 2s. and none at all. They who by their votes refused all rate whatever

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(1) 1 Sir W. Bl. 229 ; 2 Burr. 1017.

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did that which the law would not allow, and by the analogy of the case of election to corporate offices, already referred to, may be considered as virtually absent, and declining to co-operate with the rest in that which was required of them by law.

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Upon a review of the various authorities and opinions which have been cited and examined in this case with so much care and learning, it seems to me to be established,—That there is a legal obligation on the inhabitants of a parish to repair the church: that such obligation can only be performed by means of a rate imposed by the inhabitants in vestry: that the inhabitants of the parish are bound to make the rate when necessary, and they are required to *do so by competent authority: that if the majority of those assembled in a vestry held for the purpose of making a rate shall refuse to make any rate at all, though the want of repairs is admitted, and the amount of the rate is not in question, they are to be considered as declining to take part in the business for which the vestry has assembled, and, for that purpose, as virtually absent: and that, under such circumstances, a majority of those willing to obey the law, and to make a rate, may make one, though the whole of the persons willing to make such a rate are a minority, as compared with those who refused to make any rate at all.

I therefore think that the rate in question was good.

[Mr. Baron PLATT, Mr. Justice MAULE, and Mr. Justice COLERIDGE agreed with Mr. Justice WIGHTMAN that the rate appeared to be a valid rate, and that prohibition did not lie.]

[770] MR. BARON PARKE :

[*771] My Lords,—In answer to the questions proposed by your Lordships in this case, I have to say that, in my *opinion, the answer to the first question should be in the affirmative, and that the second and third questions should be answered in the negative.

Having given my reasons fully in the Court of Exchequer Chamber, when the case was argued and decided in the Court below (1), I think it is unnecessary to do more now than to say that it appears to me that no rate is valid unless it is made with the concurrence of the majority of those actually present, and that the unanimous concurrence of the majority is just as necessary as the unanimous concurrence of all in a definite body where the law requires it.

LORD TRURO:

This case comes before the House upon a writ of error, brought upon a judgment of the Exchequer Chamber, affirming a judgment of the Court of Queen's Bench upon demurrer to a declaration in prohibition.

The question raised by the demurrer was, whether the Court of Arches of London was exceeding its jurisdiction in proceeding to enforce the payment of a certain church-rate set forth in the libel.

The libel was originally exhibited in the Consistorial and Episcopal Court of London, by the churchwardens of the parish of Braintree, in the county of Essex; and the libel prayed that the plaintiff in prohibition might be condemned to pay a certain sum assessed upon him by an alleged church-rate, made by the vestry of that parish. The admission of the libel was opposed, on the ground that the alleged church-rate had not been made by a competent authority; that is, that it had not been made by a majority of the inhabitants of the parish, duly assembled in vestry, and that therefore the Court had no jurisdiction to enforce the payment.

The Judge of the Consistorial Court held the rate to be invalid, and refused to admit the libel.

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Against that decision the churchwardens appealed to the Court of Arches, and the Judge of that Court held the rate to be valid, and reversed the previous decision, and admitted the libel. The plaintiff thereupon applied to the Court of Queen's Bench for a writ of prohibition; and after discussion, the plaintiff was directed to declare in prohibition, which he did, and the defendant demurred to the declaration. After argument of the demurrer, the Court held the rate to be valid, and gave judgment for the defendant. A writ of error was then brought in the Exchequer Chamber, and that Court affirmed the judgment, whereupon the plaintiff brought his writ of error in Parliament, which is now standing for the judgment of this House.

As the case may much depend upon the construction of the libel in regard to the person by whom the rate in question was made, it is essential that the contents and effect of the libel should be accurately presented to the attention of the House.

The declaration in prohibition sets forth the libel, from which it appears that a prohibition had been granted to stay proceedings in the Ecclesiastical Court, which had been adopted to enforce the payment of a church-rate, made by the churchwardens in 1841.

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That a monition was afterwards issued, at the instance of the vicar, commanding the churchwardens to summon a vestry, and commanding the inhabitants, when assembled, to make a rate for the necessary repairs of the church. That a vestry was accordingly duly summoned, and held on the 15th July, 1841, for the purpose of making a church-rate. That at such vestry the churchwardens produced surveys and estimates, showing the amount necessary to be raised by a rate to repair the church and provide for the celebration of public worship; and that the vicar having then taken the chair, the churchwardens *proposed that a rate of 2s. in the pound should be made, whereupon an amendment was moved, and carried by a great majority, to the effect that, for certain irrelevant reasons, the vestry should refuse to make a rate.

The irrelevant reasons referred to, which were assigned in the amendment so moved, were to this effect: "That all compulsory payments for the support of the religious services of any sect, or people, appears to the majority of this vestry to be unsanctioned by any portion of the New Testament Scriptures, and altogether opposed to and subversive of the pure and spiritual character of the religion of Christ." The amendment then goes on to say, that it is unjust for one religious sect to compel others which disapprove of its forms of worship or system of Church government to contribute to its support. And it concludes by saying, "This vestry feels bound, by the highest obligations of social justice and religious principle, to refuse to make a rate, and does refuse accordingly." The libel then proceeds to state, that after such amendment was carried, and the rate refused, and no affirmative answer returned to the question whether there was any other proposition as to the amount of the rate, the churchwardens and others of the ratepayers and parishioners then present did, in obedience to the monition, rate and tax the inhabitants and parishioners liable to contribute to a church-rate, &c., the several sums of money mentioned in the rate, being an assessment of 2s. in the pound on the annual value of rateable occupation; and that a rate of 2s. in the pound was then produced, made, and signed by the vicar and churchwardens, and other of the parishioners and ratepayers then present. The libel then sets forth the defendant's liability, assessment, and non-payment, and prays that he may be condemned to pay the sum assessed upon him, and the costs. The libel then states, that the proponent produced the rate in question, and deposited the same in the registry of the Court.

The libel then contains the following passage: "That in part supply of the proof of the premises in the libel pleaded, and to all other intents and purposes in the law, the proponent did exhibit, and to the libel annex, and pray to be there read and inserted, and taken as part and parcel thereof, certain papers, and among them a certain writing, propounded to be a true copy of the entry of the proceedings of the vestry of the 15th July, 1841, at which the rate in question was made, such proceedings being entered in the vestry-book by the acting vestry-clerk, with the privity and concurrence of the vicar, who was chairman. And such paper writing, after setting forth the prior proceedings of the vestry, contains the following statement in relation to the making of the rate: 'Mr. Veley then proposed, on behalf of himself and Mr. Joslin, addressing himself to those ratepayers who were willing to obey the monition, that a rate of 2s. in the pound should be made by them, and a rate of 2s. in the pound is produced and signed by the vicar, the two churchwardens, and several ratepayers present. Mr. S. Courtauld, as the mover of the amendment, protested on his own behalf, and on behalf of the meeting, against the irregularity and impropriety of the churchwardens attempting to make a rate after it had been refused by a large majority of the vestry, and protested also against the rate so attempted to be made. B. SCALE, vicar; A. C. VELEY, THOMAS JOSLIN, churchwardens; SAMUEL COURTAULD, E. G. CRAIG, parishioners.'" Such are the material parts of the libel.

The case was ably argued at the Bar, and after the argument your Lordships were pleased to put the following questions to the Judges who had attended during the argument:

1st. Does the present record show the rate sought to be enforced to be an invalid rate?

2nd. Does such rate appear to be a valid rate?

3rd. Does prohibition lie against the enforcement of the said rate in the circumstances apparent on the record?

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In answer to your Lordships' questions four of the learned Judges, Mr. Justice COLERIDGE, Mr. Justice MAULE, Mr. Baron PLATT, and Mr. Justice WIGHTMAN, have expressed their opinions to be that the libel set forth a valid rate.

Mr. Justice TALFOURD expressed an opinion that the rate set forth did not appear to be an invalid rate, nor did it appear to be a valid rate; and that the prohibition ought not to go, inasmuch as the application for it was made after sentence.

Other five of the learned Judges, Mr. Justice CROMPTON, Mr.

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Baron MARTIN, Mr. Justice ERLE, Mr. Justice WILLIAMS, and Mr. Baron PARKE, stated their opinions to be that the rate set forth in the libel appeared to be an invalid rate.

Upon referring to the opinions which have been delivered by the respective Judges, it will be seen that the Judges are unanimously of opinion that a valid church-rate can only be made by an actual or constructive majority of the parishioners in vestry assembled. Secondly. That if it appears upon the face of the libel that it was not so made, prohibition ought to be granted. Thirdly. The great majority of the Judges are of opinion that prohibition ought to be granted, unless it appears affirmatively that it was so made; but some of the Judges are of opinion that prohibition ought not to go unless it appears affirmatively not to have been so made; and those Judges found their opinion upon the assumption that sentence had been pronounced in the Court below, before the prohibition was moved for, and therefore, according to the rule which prevails in regard to prohibition moved after sentence, prohibition ought not to be granted unless the want of jurisdiction *appears affirmatively upon the face of the libel; in other words, unless it appears to have been made by an incompetent authority.

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It is obvious, therefore, that it is necessary to ascertain what is the correct import of the libel in regard to the persons by whom the rate was made. The libel, after setting forth the proceedings of the vestry up to and including the carrying of the amendment by which the vestry refused to make a rate, proceeds in the following manner: "That the majority of the vestry having refused to furnish the necessary funds, the churchwardens and others of the ratepayers and parishioners then present in vestry did, in obedience to the monition, at the vestry, and while the parishioners so continued in vestry assembled, rate and tax the inhabitants and parishioners liable to contribute for and towards, &c., the several sums of money mentioned in the rate, being a rate of 2s. in the pound on the annual value of, &c.; and that accordingly a rate of 2s. in the pound was then and there produced, made, and signed by the vicar, churchwardens, and others of the parishioners then present." The libel then sets out the rate deposited in Court.

The rate commences with the following heading or title: "We, the churchwardens and other parishioners of the parish of Braintree, whose names are hereunto subscribed, do hereby, in pursuance of and in obedience to a monition, &c., rate and tax all and every the inhabitants and parishioners of the parish of Braintree, liable to

contribute, &c., for and towards the necessary repairs of the church, and for and towards providing, &c., the several sums of money hereinafter mentioned, being a rate or assessment of 2s. in the pound, upon the annual value of all rateable property occupied within the parish." Then follow the names of the parishioners rated, the property in respect of which they are rated, and the amount assessed upon them respectively; *and the rate purports to be signed at the foot by the vicar, churchwardens, and eighteen ratepayers.

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It will have been observed that the libel in the defendant's case states, that the churchwardens and others of the ratepayers present in vestry rated and taxed the inhabitants, and accordingly signed the rate produced.

The entry of the proceedings of the vestry, as likewise set forth in the defendant's case, states that Mr. Veley proposed, on behalf of himself and Mr. Joslin, addressing himself to those ratepayers who were willing to obey the monition, that a rate of 2s. in the pound should be made by them; and that a rate of 2s. in the pound was produced and signed by the vicar, the two churchwardens, and several ratepayers present, the mover of the amendment protesting, on behalf of the meeting, against the rate so attempted to be made.

Very different constructions have been put upon these statements in the libel in regard to the persons by whom the rate was made. The Judge of the Consistory Court held the libel to import that the rate was made according to its title; that is, by the churchwardens and the eighteen parishioners who signed the rate. The Dean of the Arches construed the libel to mean that the rate had been made by the churchwardens. The majority of the Judges inferred that the rate had been made by the minority of those who voted against the amendment, or the majority of such minority. Mr. Justice TALFOURD held, that the libel did not furnish the means of determining by whom the rate was made.

The allegation in the libel that the rate was made and signed by the vicar, churchwardens, and others of the parishioners and ratepayers then present, is very general. The entry of the proceedings is somewhat less general, as that states that the churchwarden, addressing himself to *the ratepayers who were willing to obey the monition, proposed that the rate should be made by them, and that the rate was produced and signed by the vicar, the two churchwardens, and several ratepayers present. The rate itself is definite,

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as the heading or title to it states that the rate was made by the churchwardens and eighteen parishioners, who signed the rate.

The rate itself, thus expressly declaring by whom it was made, would appear to be the best evidence upon the subject, and it is expressly referred to in the libel, and prayed to be accepted as the proof of the allegation in the libel. The construction of the Judges would seem to be founded more upon the language of the allegation in the libel than upon the proof referred to. And it certainly is a strong construction, when the rate, upon its face, states it to have been made by the churchwardens and eighteen parishioners, who signed it, to hold that that imports the rate to have been made by the whole minority of the vestry. Neither does the entry of the proceedings seem very consistent with such construction, inasmuch as that states the rate to be made by the vicar, the two churchwardens, and several ratepayers present, they not being described as even constituting the body of ratepayers willing to obey the monition. The entire absence of any statement importing that the negative of the proposed rate was put in any form or to any portion or section of the vestry, however composed, is material.

The argument urged at the Bar, and adopted by some of the Judges, in support of the construction that the rate was made with the unanimous concurrence of the minority who voted against the amendment, has been mainly founded upon the assumption that all the details, by which the amount of the rate would be regulated, had been assented to by the vestry, and that therefore the amount of the rate followed as of course, and that the only question the vestry had to consider was, rate or no rate.

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The details by which the amount of the rate required would be governed were, the extent of the repair required by the church, the necessary cost of such repair, the number of persons who ought to be omitted from the rate by reason of poverty, the amount necessary to defray the expenses incident to public worship, and whether the required amount should be raised by one or more rates.

The only statement contained in the libel as to these details is, that a survey and estimate respecting the repair required by the church, and the necessary cost of the repair, and an estimate of the incidental expenses, was produced, and that a number of persons, whose rates would amount to 1,000*l.*, were omitted from the rate by

reason of their poverty. But not a word is to be found importing that any of the documents were read, or that the contents were stated, or that they were the subject of attention by the vestry, or any one parishioner, or that a single sentence was uttered concerning them.

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From the single statement that these documents were produced, the unanimous assent of this otherwise discordant vestry is assumed to details so open to question and difference of opinion, and this assumption is the foundation for some of the most important arguments in support of the rate; and the assumption is made without adverting, in the slightest degree, to many circumstances which strongly repel the inference that the absence of objection to those details, or remarks upon them, ought to be referred to an acquiescence in them by the entire vestry.

Remembering that it appears upon the record that a rate was refused by the vestry in 1837, and remembering also the irritating and expensive litigation which had since prevailed *in this parish respecting the power by which a church-rate can be made, it is obvious that the parishioners came to the vestry in anticipation of a severe conflict upon that question, and it does not appear that a word was said upon any other subject. That question appears to have been the exclusive and absorbing subject of attention. And yet the validity of the rate is supported upon the footing of its having been made by the whole minority who voted against the amendment, upon the ground of an assumed acquiescence in the details, which details do not appear to have been the subject of attention or remark.

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It is quite apparent that the vestry was assembled with the express view of raising the question whether any portion of the vestry could, in opposition to the majority, make a valid church-rate. And therefore, the admitted uncertainty of the libel relating to the manner of making the rate is remarkable, and can scarcely be referred to negligence or inadvertence. Nothing could have been more simple than a statement that the rate had been adopted by a vote of the minority who were willing to concur in making a rate, if the fact had warranted so plain a statement; and the rate itself would, no doubt, have testified to its being made by the whole minority, if such had been the fact. Whereas, as before stated, the memorandum upon the rate shows it to have been made by the eighteen parishioners who signed it at the time, and the churchwardens.

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The uncertainty in regard to the persons by whom the rate was made is to be much regretted, because, in the event of the judgment being affirmed, it is calculated, in connection with the opinion of the Judges, to continue the parish involved in litigation. The construction upon which the Judges have founded their opinion of the validity of the rate being that it was made by the minority or a majority of it, it follows that, in the event of the cause below proceeding, *and the evidence establishing that the rate was not made according to the construction of the Judge of the Consistory Court, or that of the Dean of the Arches, the opinion of the Judges will be an authority in favour of the plaintiff's right to a prohibition against enforcing a rate so made. In my opinion, the result of the evidence referred to in the libel shows that the rate was made according to the statement in the heading or title of the rate itself,—that is, by the vicar, the churchwardens, and eighteen parishioners who signed it, and that it never was put to the vote of any portion or section of the vestry whatever, and that no opportunity whatever was offered to any one to express a negative of such a rate.

Regard being had to the established rule of law, that no rate, tax, or pecuniary burden can be enforced, unless the legal authority to make such rate, or impose such burden, is clearly shown, it may excite surprise that this admitted uncertainty of the authority by which the rate was made has not created more difficulty in affirming its validity. Supposing the libel does not show a rate made by the majority of the vestry, actual or constructive, according to the opinion of the great majority of the Judges, it is invalid, and the Court below ought to be prohibited from proceeding to enforce the payment.

There are some preliminary points which seem to call for observation, before I submit the view I entertain upon the leading questions of the case. I would notice, first, that the Ecclesiastical Court is one which is bound to show jurisdiction upon the face of its proceedings, except that a party who shall have acquiesced in the jurisdiction, and been content to rely for success upon the merits, is not allowed, after an adverse decision upon the merits, to move for prohibition, unless he can show an absence of jurisdiction upon the face of the proceedings.

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In Bacon's Abridgment, tit. "Courts," D., p. 392, it is said, "That the Ecclesiastical Court is an inferior Court, subject to the control of the King's Temporal Courts when it exceeds its juris-

diction ; and is bound and circumscribed by certain laws and stated rules, to which, in all their pleadings and judicial determinations, they must square themselves." Again, D. 4, pl. 4, p. 396, it is said, "Inferior Courts are bounded in their original creation to causes within such limited jurisdiction ; hence it is necessary for them to set forth their authority, for, as hath been clearly observed, nothing shall be intended within the jurisdiction of an inferior Court but what is expressly alleged to be so."

In the notes to the case of *Peacock v. Bell* (1), it is stated, with reference to this point, that, "in actions in inferior Courts, it is necessary that every part of that which is the gist and substance of the action should appear to be within their jurisdiction."

Whether jurisdiction is shown upon the libel in this case depends upon the question whether the rate is shown to be a valid rate ; in other words, whether it appears to have been made by a majority of the vestry legally constituted.

Further, in consequence of the remarks of some of the Judges, it is material to observe, that the authorities show that, by the law and practice of the Ecclesiastical Courts, every libel or allegation must set forth not only averments but facts, which, if proved, will entitle the party to the relief sought for. The libel in this case had been rejected by the experienced Judge of the Consistory Court, upon the ground that the libel showed that the rate had been made by the churchwardens and eighteen parishioners who signed, and not by the majority of the vestry, and that therefore it showed an invalid rate, of which the Court had no jurisdiction *to enforce the payment. Upon appeal, the DEAN OF THE ARCHES reversed this decision, and admitted the libel to proof, upon the ground that the libel imported that the rate had been made by the churchwardens, and that, under the circumstances which had occurred, the churchwardens were legally competent to make a rate.

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The law is very clearly stated, regarding what is requisite in the pleadings of the Ecclesiastical Court, by Sir JOHN NICHOL, in the case of *Montefiore v. Montefiore* (2), and is adopted and acted upon by Dr. LUSHINGTON in the case of *Neeld v. Neeld* (3).

The case of *Montefiore v. Montefiore* arose upon a question of the admissibility of the allegation propounding a will, and the learned Judge expressed himself to the following effect : "The cause must proceed, indeed, should the Court admit the allegation, in order to

(1) 1 Wm. Saund. 74 a, n. I.

(3) 4 Hagg. 263.

(2) 2 Addams, 354.

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this being proved : as it only assumes an allegation to be true for the purpose of determining whether it be admissible, its final avail and efficacy, in the cause, obviously depending upon whether, and to what extent, the allegation is proved, after being so admitted. In assuming, however, an allegation to be true for the purpose of determining its admissibility, the Court only assumes to be true those facts pleaded in it capable of satisfactory proof; and not, by any means, all the several averments which may stand in the allegation, which in effect are mere inferences deduced somehow or other from those facts. The averments in a plea are to be taken for true, so far only as the facts pleaded justify inferences to the effect of those averments; which, whether they do at all, and, if so, to what extent, it is for the Court to determine. For instance, in this sort of allegation, 'intention' on the testator's part to do so and so is always averred, but such averment goes for *nothing, unless the Court can infer that the testator's intention was as averred, from the facts pleaded. So when again, in a plea of this same description, the testator's capacity at the time of doing the testamentary act is averred, as it always is, the truth of that averment is only assumed by the Court, even in deciding upon the admissibility of the plea, to what extent it thinks that the facts and circumstances of the transaction, as pleaded, warrant an inference that he was of capacity at such time; and so in other matters. . . . The Court being of opinion that all the circumstances pleaded in the allegation will not be sufficient, if proved, to sustain the paper propounded, rejects the allegation."

In *Neeld v. Neeld*, the question also arose upon the admissibility of the libel. The object of the suit was to obtain a divorce for alleged cruelty; and in the judgment of Dr. LUSHINGTON, it is said, "that the admissibility of a libel depends upon the solution of the question, whether the facts, as set forth, which are to be taken as true, would prove cruelty. The only question is, whether the charges laid in the libel are sufficient to justify me in eventually admitting it to proof. . . . It has been said that the libel must be taken, for the purpose of argument, as true. To that position I entirely accede when rightly understood. This principle, however, does not go the length of supposing every syllable stated to be true. Averments distinctly pleaded as facts must be assumed to be proved, while averments of an inferential and argumentative character are to be taken only as true to the extent that the inferences themselves can be fairly drawn from the circumstances pleaded as facts. I am

bound to form my judgment upon the libel and exhibits." In that case the libel was rejected.

In *Clowes v. Clowes* (1), the law is recognised that a libel *which does not state a case which, if proved, will entitle the prosecutor to a sentence, ought not to be admitted. The books of authority, Ayliffe's *Parergon*, Oughton, and Consett, state the rule to the same effect.

There is no doubt that, if either of the Judges of the Ecclesiastical Court had considered the libel as so uncertain and general as it would seem to be, from the variety of constructions that have been put upon its import, it would have been rejected upon that ground, the law of that Court requiring the facts to be stated with that degree of distinctness and certainty which will apprise the defendant of the evidence intended to be given, in order that he may be in a condition to cross-examine the witnesses, or to repel or contradict the evidence, if untrue; and as the evidence in support of the libel is not disclosed until after the opportunity to cross-examine and to give evidence in opposition to it has passed, it is obvious that, except for the protection afforded by the rule of law referred to, a defendant could be subjected to great surprise, and be without the notice necessary to enable him to defend himself. But each of the Ecclesiastical Judges held the libel to be ambiguous; that is, one holding it to import the rate to have been made by the parties who signed it, and the other that it was made by the churchwardens; the Judges differing from both,—one Judge being unable to collect any distinct meaning from it, and the others being uncertain whether it was made by the minority or a majority of such vestry.

The third question put to the Judges, viz., "Does prohibition lie against the enforcement of the said rate in the circumstances apparent upon the record?" seems to have referred to the point which had been raised, whether sentence has been pronounced in the Court below, within the meaning of the rule which requires a plaintiff in prohibition to establish an absence of jurisdiction apparent upon the face of the proceedings.

It is quite clear, when attention is paid to the state of the proceedings in the Ecclesiastical Court, at the time the motion was made for the prohibition, that there is no foundation whatever for the assumption, that any sentence has been pronounced, within the meaning of the rule referred to.

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The monition issues at the instance of the party without the intervention of the Court, and, after appearance, it is the duty of the proponent or plaintiff to exhibit a libel, and to apply to the Court that it may be admitted or received; and until the libel is admitted, the Court has no cognizance of the cause. It is competent to the defendant to oppose the admission upon various grounds, and among them, that the libel does not state facts which, if proved, will entitle the proponent to the sentence he prays, or that it states extraneous matter, or that the facts do not show a case within the jurisdiction of the Court. If the Judge admits the libel, the cause is then in Court, and the defendant may either rely upon the proponent failing to prove his case, or he may make an allegation by way of defence, and may give evidence on his own part. When the evidence is complete, the case is heard, and the defendant upon the hearing may again contend that the Court has no jurisdiction either over the subject-matter or over the person, or that the case is not brought within the jurisdiction, or that the evidence does not support the libel; sentence is pronounced after hearing the advocates.

Such being the course of proceeding in the present case, the defendant below, the now plaintiff, opposed the admission of the libel in the Consistory Court, upon the ground that the libel did not show a church-rate made by competent authority, and that the Court, therefore, had no jurisdiction to impose the payment. The Judge of that Court held the objection valid, and rejected the libel. That decision, upon appeal to the Dean of the Arches, was reversed, and the *libel admitted, whereupon the plaintiff moved for the prohibition.

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The admission of the libel decided nothing more than that the Court would entertain the suit, the defendant being, as before stated, at full liberty to insist at the future hearing that the libel does not show a valid rate, or that the evidence does not prove the libel, or any other conceivable defence.

There are several sorts of decisions, orders, decrees, or sentences, in the Ecclesiastical Court. The first class consists of interlocutory orders or decrees, upon incidental matters occurring in the progress of the cause before the hearing, but which decisions offer no bar to the cause proceeding to hearing and definitive sentence. The second class of interlocutory orders or decrees consists of those which have the force of definitive sentences, that is, they are decisions which determine the suit and put an end to the cause,

and are therefore called orders or decrees, bearing the force of a definitive sentence, and are not subject to be reviewed at any future hearing. The third class consists of definitive sentences or decrees pronounced at the hearing, by which the case is determined.

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Orders of the first class, if improper and objectionable, are denominated grievances, and may be objected to at the time they are made, or at the hearing, but are not the subject of appeal until after definitive sentence. But after definitive sentence has been given, the party complaining may appeal against the grievance alone, or against the grievance and the sentence together, if the sentence is supposed to be objectionable. Orders of the second class, that is, having the force of definitive sentences, may be the subject of immediate appeal, inasmuch as further proceedings in the cause cannot take place during their existence.

The admission of the libel by the DEAN OF THE ARCHES in this case constituted what is denominated a grievance, a decree not having the force of a definitive sentence; and which, therefore, cannot be the subject of appeal until after definitive sentence shall be given, and which was no definitive sentence, as before stated, upon anything but that the cause should be entertained, and is liable to be reconsidered and reversed by the same Judge at the hearing, and is therefore clearly not a sentence within the rule, which confines a plaintiff in prohibition to objections to the jurisdiction apparent upon the libel; while, at the same time, it must be remembered, that the plaintiff's case is, that the absence of jurisdiction is apparent upon the libel.

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As some of the Judges appear to have been much influenced by the consideration of the sentence having been pronounced below before the prohibition was moved, it may not be inexpedient to refer to authorities explaining, to the effect before stated, the nature of the various sentences, decrees, and orders in the Ecclesiastical Court. In Ayliffe's *Parergon*, tit. "Of Sentences Definitive and Interlocutory," p. 486, it is thus stated: "A sentence is a judicial declaration which puts an end to a suit according to the nature of the thing in dispute." Page 487: "An interlocutory is a sentence or declaration of the Judge, pronounced betwixt the beginning and end of a cause, touching some incident or emergent matter in the proceeding. A definitive sentence differs from an interlocutory, for that the principal matter in question, and which is principally deduced in judgment, is determined by a definitive sentence. But an interlocutory does not concern the principal

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matter, but only determines some exception or other which arises in the proceedings, and by this an end is not put to the principal matter in controversy; for it is not called a sentence, without a final condemnation or absolution. It differs from an interlocutory, *because a person condemned by a definitive sentence may appeal from such sentence; and the appeal alone, without the inhibition of the superior Judge, suspends the force and execution of the sentence. But, according to the civil law, it cannot be appealed from an interlocutory (*sic*), unless the grievance be of such a nature that it cannot be redressed by a definitive sentence; and if it be appealed, the execution of it is not suspended without an inhibition. It also differs from an interlocutory, because, by the word sentence, simply used in a statute or other matter of law, a definitive sentence is always intended, and not an interlocutory; because a definitive sentence cannot be reversed by the same Judge, but an interlocutory may be reversed at any time by the same Judge before a definitive sentence be pronounced, and in respect thereof it never passes *in rem judicatam*, the Judge having not as yet discharged himself of his office, because the Judge who has pronounced an unjust interlocutory, as by not admitting what ought to be admitted, or by admitting what ought not to be admitted, &c., may even at the foot of a sentence consider thereof, and revoke the same by correcting what he has done amiss. It differs from an interlocutory, because a definitive sentence may, in the cause (*sic*) of an appeal, be justified from the same, and form new acts. A definitive sentence is not valid unless it be pronounced and given in writing; but an interlocutory may be pronounced without writing, though it ought afterwards to be reduced into writing, that it may appear from the acts of Court." Other distinctions are pointed out.

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Again, in Ayliffe, p. 71, tit. "Of Appeals, their Effects and Incidents belonging to them," it is stated, "An appeal from a definitive sentence is defined to be a judicial right whereby the former sentence is for a while extinguished, and the cognizance of the cause devolved to the superior Judge, called a Judge *ad quem*. But this definition, in my *opinion, does not well explain it. Wherefore, I shall define such an appeal to be a provocation from an inferior to a superior Judge, whereby the jurisdiction of the inferior Judge is for a while suspended." In p. 74, par. 4, he says, "A judicial appeal is sometimes made before a sentence is pronounced, and sometimes afterwards. If it be made before a sentence, it is either made

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from a grievance or an interlocutory decree; and if it be appealed from a grievance, it is either appealed from a commination of a Judge, or else from some nullity and irregularity in the proceeding which cannot be repaired by a sentence." In p. 76, par. 3, he says, "When a law or statute takes away an appeal from a sentence, it is only meant from a definitive, and not from an interlocutory sentence, because an appeal from a sentence is only meant for a definitive sentence."

In Oughton's *Ordo Judiciorum*, vol. i. tit. 276, two sorts of appeals are described from a definitive sentence, or from an interlocutory decree, having the force of a sentence. And tit. 278 includes the admission or rejection of material matter among the grounds of appeal.

In Clerke's *Praxis of the Admiralty* (of which the proceedings are analogous in many respects to the proceedings in the Consistory Court), tit. 53, "Of an Appeal from the Definitive Sentence," it is said, "It is lawful for either party to appeal from the definitive sentence, or interlocutory decree having the effect of a definitive sentence." And he refers for the manner and form of interposing these appeals to the titles relating to appeals in ecclesiastical causes. In tit. 54, he says, "that it is not lawful to appeal from grievances or an interlocutory decree not having the effect of a definitive sentence," and states as a reason why such appeals are not allowed, "because relief may be had by an appeal from the definitive sentence." Tit. 55 describes what shall be deemed an irreparable *grievance or an interlocutory decree, from which an appeal may be had, and after giving instances in which the decree had the effect of concluding the matter adjudicated, says, "This is called a grievance irreparable, and an interlocutory decree having the force of a definitive sentence. Nor can you hope for any other sentence in that decree;" and he refers to Oughton, tit. 123, for a definition of what should be deemed an interlocutory decree having the force of a definitive sentence.

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It also appears that a defendant can, before contestation, object that the Court is incompetent, or that the Court has no jurisdiction: Oughton, tit. 223, 224.

Consett's *Practice* will be found consistent with the authorities I have stated. In part 3, c. 6, sec. 1, part 2, p. 161, tit. "Of Sentences in those Plenary Causes." In part 5, c. 3, sec. 1, par. 1, p. 257, tit. "The manner of appealing and prosecuting Appeals from Grievances." In part 5, c. 2, sec. 1, p. 229, tit. "The manner of

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proceeding in Causes of Appeal from a Sentence." In p. 400, "Discourse, showing the order and structure of a Libel."

This objection is made after appearance, and such is the objection made by the now plaintiff in the Court below, but the authorities I have mentioned are decisive to show that the order admitting the libel is no decision or definitive sentence of any matter in dispute, as every point in contest is open to litigation at the hearing.

The effect of showing that no sentence has been pronounced restrictive of the plaintiff's right to prohibition, therefore is to raise the question, whether the jurisdiction of the Court to enforce the payment of the rate is shown affirmatively upon the libel; that is, does the libel show a rate made by a majority, in any legal sense, of the vestry?

In reference to this question, it appears from the opinions which have been delivered by the learned Judges that considerable
[*792] *differences have prevailed among them as to the effect of the amendment voted by the majority of the vestry.

The statement upon that subject is, that after the churchwarden proposed that a rate of 2s. in the pound should be made, an amendment was moved, stating certain reasons why a church-rate should not be made, and it concluded with these words: "This vestry feels bound by the highest obligations of social justice and of religious principle to refuse to make a rate, and does refuse accordingly."

Those who deny the validity of the rate insist that the amendment was in effect a direct negative of the proposal to make the rate, although the terms of it also negatived any rate whatever. Those who argue in favour of the validity of the rate, contend that the amendment was merely an idle declaration against church-rates generally, but did not import a negative of the 2s. rate proposed, and therefore, they say that the original proposition never having been negatived by the majority, it became competent to the minority to adopt it in the manner stated in the libel, without the question of its adoption being put to the vote.

The effect of the amendment has thus been considered material and open to doubt. But it does not appear to me to be either doubtful or material, as I conceive the question to be, whether the rate is to be considered in law as having been made by the majority of the actual or constructive vestry. But if the question be material, I think that the amendment was intended to express that those who voted for it refused to make the proposed rate of 2s. in the pound, or

any other rate; and I also think it is clear from the statement in the libel that it was understood in that sense by the vestry generally.

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In relation to many collateral objections which have been urged against the rate, several of the Judges who held the rate to be valid have observed that the proceedings of a *vestry cannot be invalidated by the non-observance of any of those forms which regulate the proceedings of other assemblies, and that it is sufficient to render the vestry proceedings legal and binding, if the parties assembled understand what is intended to be done, and assent to it.

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Adopting and applying these remarks to the terms of the original proposition, and of the amendment, and to a detail of the manner in which the rate was made, I think no doubt can remain that the amendment was understood by the vestry to have been as well a refusal to make the 2s. rate as a refusal of any other rate. The original proposal was that a 2s. rate should be made—the amendment was that, for the reasons stated, “The vestry feels bound to refuse to make a rate, and does refuse accordingly.”

The subsequent course of proceedings seems to me to manifest that this understanding of the vestry was that the majority had by the amendment negatived the 2s. rate proposed. The resolution refusing a rate, although denominated an amendment, was in effect a direct negative of the original proposition, preceded by irrelevant reasoning. Supposing the original proposition had been put by the chairman, and the majority had voted a simple negative, no doubt could have been entertained of the effect; and after a proposal to make a 2s. rate, an amendment concluding with a vote that the vestry “does refuse to make a rate,” seems to me to be open to no ambiguity as to its effect.

It appears that the churchwardens and some other of the parishioners had determined that the majority who had voted for the amendment should be treated as having withdrawn from all further interference in making a rate, because if it had not been understood that the 2s. rate had been negatived, I think the proposal that such a rate should be made would have been put by the chairman to the minority. But instead of that course being taken, the churchwarden *addressed his proposal to those only who were willing to concur, not in a rate generally, but in a 2s. rate; and his invitation resulted in eighteen parishioners signing the 2s. rate; it being, for anything that appears, quite uncertain whether the persons composing the minority were unanimous in favour of a 2s. rate, and no opportunity was offered to any one to vote against it.

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It seems to me, therefore, that the 2s. rate was adopted upon the understanding that such rate had been refused by the majority of the vestry.

In proceeding to consider the main question, whether the refusal of the majority of the vestry to make a church-rate, when legally bound to do so, gave authority to the minority to make a rate to the exclusion of the majority from interfering in the matter, I cannot but observe that, notwithstanding the parties have expressed their desire that such question should be decided, yet numerous points have been raised by both sides, many of which, if valid, would preclude the necessity of any such decision.

In regard to that question, however, there is no ambiguity as to the fact that the rate was not made by an actual majority of the vestry; but it was made in direct opposition to the vote of the majority; and adopting, in support of the rate, the most favourable construction of which the libel will admit, the facts may be stated to be that a church-rate was required to put the church in a necessary state of repair, and to pay the expenses incidental to public worship; that at a vestry, duly assembled, the majority of attending parishioners, upon illegal and unfounded grounds, refused to make a rate; and that the rate in question was made by some of the inhabitants assembled, in opposition to such refusal by the majority.

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It is satisfactory that some of the points most material to the decision of the main question are not in controversy. It is admitted that the parishioners of every parish are under *an imperative legal obligation to provide for the necessary repair of the church, and to the expenses incidental to public worship. It is admitted that the only authority by which a valid church-rate can be made, is that of the legal majority of the parishioners duly assembled in vestry. And it is admitted that the rate in question was not made with the consent of the actual majority of the vestry.

But in support of the rate it is said, that although it was not made by an actual majority of the assembled vestry, it is nevertheless valid as having been made by a constructive legal majority of that vestry. The course of reasoning by which the minority is said to have become a constructive legal majority of the vestry, is by insisting that the vestry being assembled under a legal obligation to make a church-rate, when the persons constituting the majority refused to make a rate, they virtually disclaimed and withdrew from interference in the only duty and business of the vestry,

whereby the vestry became constituted only of the persons composing the minority, who were willing to make a rate, and that the subsequent interference of the majority, by protesting against a rate being made, was equally illegal and unavailing.

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The general proposition that no pecuniary charge or burden can be imposed, but upon clear and distinct authority, is not controverted. But the present rate is said to be sustainable upon a principle analogous to that upon which votes given at elections to disqualified candidates are held to be unavailing, or as it is called, thrown away, and which principle it is said requires that the votes of the majority refusing to make a rate should be held to be altogether nugatory.

There is no doubt that the rule or principle referred to has been acted upon in elections, but no text-book or authority has been mentioned in which it has been recognized as *a general principle, or has been adopted in other than election cases, still less in cases connected with the imposition of pecuniary burdens, or as creating an exception to the admitted rule of law that a valid church-rate can alone be made by a majority of the vestry.

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The history of church-rates and the law which has hitherto been recognized as applying to them may require a remark. Numerous instances have heretofore occurred of vestries refusing to do their duty by making a required church-rate, and during that time many learned Judges have filled the courts of law and the Ecclesiastical Courts. And the study of the ecclesiastical law was more generally pursued in former than in modern times, and many of the higher clergy were familiar with it, but no exception to the general proposition of the power to make a church-rate being in the majority of the vestry has ever been suggested, nor any mode by which the illegal refusal of a vestry to do its duty could be counter-vailed. The evil was considered irremediable except by coercion of the contumacious parishioners, and the method of coercion resorted to was either excommunication or interdict, the latter of which proceedings involved those willing to make a rate, alike with the unwilling, in one common punishment. But, although no rate might be made, the injustice was alleviated by those who professed their willingness to concur in making a rate being absolved, which it is not probable would have been done, but upon the assumption of the inability of the absolved, of their own power in vestry, to make the required rate.

When the lengthened period during which this state of things

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continued is considered, while the absence of any power to make a valid church-rate in opposition to a contumacious majority was deeply lamented, a strong presumption arises against the validity of the remedy supposed to *be recently discovered, the discovery or invention of which is not recommended by the artificial presumption, contrary to truth and fact, upon which it rests.

The application of the principle seems to require that, while the law is admitted to be, that a rate can only be made by a vote of the majority of the vestry, yet, if such majority shall, contrary to legal duty, vote against making a rate, the law presumes from such vote, that the majority withdrew from all interference in the matter of making a church-rate, and became virtually absent from the vestry, and so became disentitled to any opportunity of voting upon any rate, of whatever amount, the minority might propose to adopt ; the simple effect being to transfer a power of taxation, hitherto held to be by law possessed only by a majority, to the minority ; and this effect is said to be warranted and supported by analogy.

The distinction must never be overlooked between persons upon whom the law has bestowed power and authority declining to interfere in relation to the subject-matter to which the power and authority apply, and those who insist upon acting in relation to it, and who object to the power and authority exercised adversely to or without them. In the first case, if the majority of the parishioners in vestry should refuse to vote or interfere upon the question whether a church-rate shall be made, and quiescently leave the whole matter to be managed by the other assembled parishioners, there can be no doubt that the quiescent majority would be bound by a rate made by the minority. Such a result can hardly be said to follow in the second case ; and in this instance the actual interference of the majority throughout was recognized by the vestry, as well by the amendment being put to the vote, as also by the protest against the attempt to make a rate in spite of their dissent being entered as part of the proceedings of the vestry. *Under such circumstances, to presume absence and non-interference is to presume against the recorded facts.

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It is not unimportant that the argument in favour of the rate not only bestows the power of making a rate, but also the power of regulating and deciding upon the amount of it, which involves many points of discretion, in which absent persons were interested.

If the law which has hitherto prevailed is discovered to be founded in error, and the correct rule of law is, that when

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the majority of the vestry refuses to make a required rate, the power to make such rate devolves upon the minority, it seems to me that the law ought to be so declared in plain terms. But I think the law ought not to be altered upon the authority of remote and analogous circuitous reasoning, and tortuous presumptions and constructions regarding the acts and intentions of men, contrary to palpable fact and truth.

While it is said that the rate is valid upon a principle analogous to that adopted in election cases, the principle thus relied upon has never been distinctly enunciated, and I have not been able to discern in those cases any principle which seems to me to be applicable, either directly or by analogy, to the present case.

It is admitted that it is essential to the validity of a church-rate, that it should be valid by a majority of the vestry; and it cannot be contended that the rate in question had the sanction of the majority, or was ever put to the vote. The most that is said is that the amendment was not a negative of the rate, and the justification of the omission to put the rate to the vote is, that it is said it would have been an idle and useless ceremony to have done so, as the vote for the amendment, although not in itself involving a negative of the proposed rate, yet demonstrated that the majority who voted for the amendment would also vote *against the proposed rate. But I cannot admit that the rate can have any greater degree of validity than would have attached to it if it had been put to the vote and negatived by the majority, as it is assumed would have been the event. And there seems to be still greater difficulty in maintaining the validity of a rate which was shown to be distinctly negatived by a majority of the vestry. I doubt if the effect of an anticipated negative can be evaded by omitting altogether to put a rate to the vote. Suppose after the amendment had been carried the vestry had adjourned for half an hour, more or less, the parishioners all remaining in the vestry, could the minority at an adjourned vestry have adopted a rate in a manner to preclude any voting upon it?

[*799]

Considering that by law an affirmative vote of the majority of the vestry is essential to the validity of a church-rate, it seems to be an extraordinary position that a negative vote given by the majority, although contrary to the legal duty of the voters, is not only unavailing, but that it also destroys the voting capacity of the majority upon any other question. The question upon the amendment was, whether the vestry should refuse to make any rate, which

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was carried in the affirmative. Those who supported the rate say that the question, whether a 2s. rate should be made, remained unaffected by such vote; and yet it is contended that, by voting for the amendment, the majority, and, with the majority, the absent parishioners, lost altogether the right of having the 2s. rate put to the vote.

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The entry of the proceedings proves that the vestry acted at the outset according to the usual form, under a chairman, and decided propositions by vote, but, without any question being put in regard to departing from that course, authority was assumed to make the rate in a different manner, that is, not through the agency of the chairman, *nor by putting it to the vote. The object intended to be gained by not putting the 2s. rate to the vote, was obviously that the majority might not have an opportunity to vote against it, which I think could not lawfully be done; and it seems to me that the validity of the rate ought to be determined, either as having been negatived by the amendment (which I think it was), or as not having been put to the vote, and being invalid for that reason.

Many cases may be imagined by which the soundness of the principle contended for may be tested. Suppose a Commissioner of Oyer and Terminer, with a power of executing it, given to a majority of the Commissioners duly assembled, and that the Commissioners being assembled, the majority of those present, instead of executing the commission, should assume authority to control the proceedings, and for bad reasons, or no reason, and contrary to legal duty, should protest against the commission being executed. In such a case, very few lawyers, who might compose the minority, would, in defiance of a protest by the majority, proceed to trial, judgment, and execution under it. And it would not be an easy task to maintain the validity of a judgment pronounced by the minority under such circumstances, the record disclosing the facts. The case thus supposed arrests the attention from its importance, but the argument is the same whether applied to important or to trifling trials, whether for capital offences or for petty misdemeanour, or, as it seems to me, to the making of a church-rate.

If the principle contended for be general and sound, considering its great importance and the extensive application of which it is capable, it is extraordinary that such a principle should nowhere be recognized, except, as it is said, in election cases. I cannot think that its recognition as a general principle should be first found

in a case relating to the imposition of a pecuniary burden. The so-called "principle" seems to *me not more sound, although more dangerous, than some of those which have heretofore been adopted to warrant the imposition of pecuniary burdens, and which in their consequences have not left a reasonable motive for imitation, but have, on the contrary, led to most distinct declarations of the law, to the effect that such burdens cannot be supported but upon the clearest authority. The application of this novel doctrine to a case like the present is only calculated to produce perpetual conflict and litigation, as, if the majority of a vestry should be determined to defy the law or to evade it, means will be found to accomplish the purpose by voting illusory rates, or by confining the vote to a simple negative of every rate proposed, or by resorting to other equally inconvenient but effectual means.

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In large bodies, whether acting politically or judicially, the reasons of a majority for voting against the adoption of proposed measures may often be impugned, and held by the minority to be irrelevant or otherwise invalid, and made the pretence on the part of the minority for assuming the character and power of a majority.

It has been properly asked, May a minority of the House of Commons elect a Speaker in opposition to the majority? May the minority of the House of Commons meet and grant supplies against the dissent of the majority? May the minority of the House of Lords proceed to judgment upon an impeachment, or any other judicial proceeding, against the dissent of the majority, upon the alleged ground that the dissent of the majority to pronounce judgment is founded upon insufficient or illegal grounds? In like manner and circumstances, May the minority of justices in Session act in opposition to the dissent of the majority?

I am not aware of any authority for the position that, where the law gives a power to a definite number or a definite portion of an indefinite number, the refusal of the *majority to concur in the proposed exercise of the power is of the less legal effect as a negative, because such refusal may be illegal and may even subject the party making it to punishment.

[*802]

The principle contended for is so novel, so extremely important, and may be of such extensive application, that the authorities which are supposed to establish or recognize it require to be carefully examined. These authorities are limited to certain election cases; but I cannot discover the connection or analogy between the rules which govern corporate elections and the law which gives the power

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to impose pecuniary burdens. To support the imposition of a pecuniary burden by the application, by analogy, of such rules to matters of taxation, does not seem to be consistent with the admitted law, that taxation can only be enforced upon clear and undoubted authority. It may be observed also, that the law regarding elections stands much less upon principle and more upon absolute rules, originating in that peculiar branch, and for the most part never yet applied to any other branch of the law, than it does in most other departments of it.

Four cases have been cited and relied upon, as establishing or recognizing the principle which, it is said, supports the validity of the rate. Two of the cases cited were decided during the time when Lord MANSFIELD presided in the Court of King's Bench, one during the time when Lord Chief Justice LEE presided; and the fourth case, during the time when Lord ELLENBOROUGH presided; in which last case the judgment was affirmed in the House of Lords. The cases referred to are *Taylor v. Mayor of Bath*, reported in Luder (1), and cited in *Rex v. Hawkins* (2). The two cases decided in the time of Lord MANSFIELD are **Oldknow v. Wainwright* (3), and *Rex v. Monday* (4); and the case in Lord ELLENBOROUGH's time was *Rex v. Hawkins*. I will state first the simple facts of the cases relied upon, and then consider their authority and application to this case.

[*803]

The case of *Taylor v. The Mayor of Bath* (1), and correctly stated in *Rex v. Parry* (5), related to the election of common councilmen for the Corporation of Bath. The elective body consisted of the major part of the mayor, the recorder, the aldermen, and common councilmen. A meeting of twenty-seven electors was held; three candidates were proposed: Taylor, Bigg, and Kingston. Bigg was not qualified, and before the election notice was given of his disqualification; Bigg polled fourteen votes, Taylor thirteen, and Kingston one. The question turned upon Taylor's election; upon a motion by Taylor for a *mandamus*, the COURT held Taylor duly elected, on the ground that the votes for Bigg, after notice of his disqualification, were thrown away, and did not operate as a negative against Taylor. The case of *Rex v. Hawkins* (2) was decided upon the same point precisely, so far as it has any relation to this case, and upon the authority of *Taylor v. Mayor of Bath*. These two cases are cited as decisive authorities, to the effect that where votes

(1) 3 Luder's Election Cas. 324.

(2) 10 East, 211; 2 Dow. 124.

(3) 2 Burr. 1017; 1 Sir W. Bl. 229.

(4) Cowp. 530.

(5) 14 East, 558, n.

are given after notice to a disqualified candidate, the election must be decided as if no such votes had been given.

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The case of *Oldknow v. Wainwright* (1) is reported in association with *Rex v. Foxcroft*. The case came before the Court upon a special verdict in a feigned issue, which had been directed to try the validity of the election of one Seagrave to the office of Town-clerk of Nottingham, *and the special verdict found, among other facts not relevant to this case, that at a meeting of twenty-one corporators, Seagrave was the only candidate put in nomination for the office; that only nine of the corporators voted, and they all voted for Seagrave; that after the election had begun, and after votes had been polled for Seagrave, eleven of the corporators protested against the election proceeding, upon the ground that the office was full by Foxcroft; that the protest was disregarded, and the mayor declared Seagrave duly elected, and he was sworn in and was held to be well elected, it having appeared that Foxcroft was not well elected.

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Lord MANSFIELD, in giving judgment, said, "That the electors who protested had no right to stop in the middle of an election; that there was no question of adjournment; that the protesting electors had no way to stop the election, when once entered upon, but by voting for some other person than Seagrave, or at least against him; whereas they had only protested against an election." And Lord MANSFIELD also said, "Whenever electors are present and do not vote at all, as they have done here, they virtually acquiesce in the election made by those who do vote."

The case of *Rex v. Monday* (2) was also decided by Lord MANSFIELD. That related to the election of seven aldermen for the borough of Portsmouth. The electors were the majority of the mayor, aldermen, and burgesses. The mayor and four aldermen assembled. Three aldermen protested against the meeting, but the mayor and one alderman persisted in going to the election, and proposed seven candidates and voted for them; notwithstanding the protest, the three aldermen voted against them, and then proposed seven other candidates, six of whom were objected *to as disqualified. The defendant was one of the seven proposed by the mayor and one alderman, and the question was as to the validity of his election.

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Lord MANSFIELD said that the difference between Parliamentary elections and corporate elections must not be confounded; that in

(1) 2 Burr. 1017.

(2) Cowp. 530.

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Parliamentary elections there was no mode of defeating one candidate but by voting for another, but that in corporations it was a different thing; and that, as the seven candidates had been proposed in one list, the question was whether the seven should be elected, and the only answer to be given was "Yes," or "No." And upon that question there had been a majority against the seven in form and substance, which made an end of the whole matter. The judgment was against the validity of Monday's election, not only upon the ground of a negative majority against, but also, that four of the candidates for whom the three aldermen voted were eligible.

It may be proper to remark that, in *Rex v. Monday*, and in *Oldknow v. Wainwright*, Lord MANSFIELD seems to have repudiated the *dictum* of some of the Judges in the case of *Taylor v. The Mayor of Bath*, that a negative vote could not be given in corporate elections.

In *Oldknow v. Wainwright* Mr. Justice WILMOT cited the case of *Rex v. Withers* (1), a case where five electors had voted and six refused to vote, and the Court had held that the six had virtually consented. What the objection to the election was, only appears by inference; and it would seem to have been that the candidate had not received the affirmative votes of the majority of the elective body. It does not appear that any elector voted against him, or for any other candidate; and it being cited as an authority for the decision then about to be given in *Oldknow v. Wainwright*, *the inference is, that it was considered to show that the majority of the corporators actually voting constitutes the elective body, whatever may be the number of electors required to be present to constitute a good meeting.

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In the cases cited, the elections took place by virtue of the charters, no vote of any kind being necessary to sanction them, and it was no condition in the election of the candidates that they should obtain a majority of the corporators assembled, but only a greater number of votes than any rival candidates; except that in *Oldknow v. Wainwright* (2), Lord MANSFIELD stated that, in corporate elections, negative votes might be given against a candidate; and he observed that those who objected to an election taking place had not voted against Seagrave; whereas in Parliamentary elections there was no mode of opposing the election of the candidate

(1) 2 Burr. 1020. See the note of the reporter.

(2) 1 Sir W. Bl. 229; 2 Burr. 1017.

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other than by voting for a rival candidate. And in *Rex v. Monday* (1) that doctrine was acted upon. The aldermen who first protested against any election taking place, voted against the candidates proposed by the mayor, and also for seven candidates of their own nomination, and such of those candidates as were qualified were held to be duly elected, to the exclusion of those nominated by the mayor and the one alderman.

The distinction, I repeat, between those cases and the present is, that the law did not require any vote of the corporation assembled to authorize the election, but, for the purpose of the making of a valid church-rate, the law did require the vote of a majority of the assembled parishioners. Further, in the election cases, the candidate required only a majority of those who should vote either for or against him, or a majority over any rival qualified candidate, and not a majority of the corporate *assembly. Again, a majority of the assembled corporators voting that an election should not take place, might be nugatory to stop an election prescribed by the charter; but an affirmative vote was not required to sanction the election, while such a vote is required to sanction a church-rate. The analogy, therefore, fails in the essential point, that is, that to make an election a lawful election, no vote is required, and for the election of the candidates only a relative majority is required, that is, a majority of the votes polled for or against the individual candidate, or a majority of votes over a qualified rival candidate. Whereas, in this case, to make a valid rate, the vote of a majority of the assembled parishioners was absolutely required, which the rate in question never had; and further, in *Rex v. Monday*, the protest of the majority of the electors against any election taking place, which was an idle and irrelevant proceeding, was not pretended to have the effect of disqualifying them from voting against the two candidates they opposed, or to authorize the mayor to reject their votes, and to treat them as having virtually withdrawn from the business of the election, and to declare the candidates for whom the mayor voted to be duly elected.

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I cannot perceive any view of that case which renders it an authority for the position, that, because the majority here had, for irrelevant reasons, voted against any rate being made, the minority acquired the power to make the 2s. rate without putting the question or allowing the majority an opportunity of voting

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upon the question. To make the cases analogous, the mayor and one alderman should have declared the candidates favoured by them to be duly elected notwithstanding the protest or the votes of the majority against them.

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Again, in *Oldknow v. Wainwright* it will be observed that, although the majority had protested against any election *taking place, so far from the Court deeming that protest to have disentitled and precluded the protesters from all right of further interference, Lord MANSFIELD states, among the grounds for his opinion, that the protesters had not moved an adjournment before the election began, importing that a motion of adjournment made in due time, that is, before the election began, would have been available, notwithstanding their previous protest. And he also states among those grounds, that the protesters had not voted against Seagrave, importing also, that they might have done so effectually. Seagrave's election, therefore, was sustained, not because by the protest those who made it virtually withdrew from the business of the election, but because they themselves forbore (not that they were excluded) further to act, by moving an adjournment or by voting against Seagrave.

From the circumstances in *Oldknow v. Wainwright* it appears that a protest that no election should take place, though irrelevant, idle, and unlawful, did not disentitle those who made it from voting upon the relevant question of Seagrave's election; and it is to be inferred from the cases of *Taylor v. The Mayor of Bath*, and *Rex v. Hawkins*, and the cases cited in *Oldknow v. Wainwright*, that notwithstanding the irrelevant and thrown-away votes for the disqualified candidates, the voters who gave them were entitled to give, and might have given, if they had thought fit, legal and effective votes against the qualified candidates, but which they did not do.

[*809]

The cases are cited as authorities for the point, that votes given for disqualified candidates are not only nugatory and thrown away, but that thereby the voters are excluded from interfering further in the election, and that the election may proceed upon the footing of their exclusion. But the cases of *Oldknow v. Wainwright* and *Rex v. Monday* are authorities to the direct contrary, and in *Taylor v. The *Mayor of Bath*, and in *Rex v. Hawkins*, and the other cases cited, no attempt was made by the voters for the disqualified candidates to vote against the qualified candidates; and therefore no question arose in regard to their right to do so if they had thought fit,

It is true that in *Taylor v. The Mayor of Bath*, Justices PAGE, CHAPPELL, and WRIGHT are reported to have said that negative votes could not be given in corporate or Parliamentary elections, which opinion, however, seems to have been overruled, if not in *Oldknow v. Wainwright*, certainly in *Rex v. Monday*. But the dictum of Justices PAGE, CHAPPELL, and WRIGHT did not refer to the fact of votes having been given for the disqualified candidates, but was laid down as a general rule in election law.

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I am utterly unable to discover how any one of these cases shows that what is called an irrelevant vote, whether given contrary to the legal duty of the party or not, disqualifies him from voting upon a distinct proposition to be afterwards determined; that is to say, I do not perceive any proper ground for holding that because the majority refuses to make any rate, the minority may make a rate of any given amount, and exclude the majority from voting upon it; and that such rate should be deemed to be a rate made by a constructive majority of the vestry. If such be the law, it is certainly not to be found in the cases cited.

The analogy between the law upon which the rate is said to be valid, and that which prevails in Parliamentary elections, has been said to be complete, because no vote of the electors can prevent the election taking place pursuant to the writ; and because votes for a disqualified candidate after notice are nugatory. I cannot admit the analogy. The electors have no control over Parliamentary elections. Their votes, if there was any authority to take them, can neither authorize nor prevent an election. But to make a *church-rate, a vote of the electors, that is the parishioners, is indispensable. Nor can I see how the fact that no vote by electors can prevent a Parliamentary election taking place is any authority for the position that no vote by the parishioners can prevent a church-rate being made. In the absence of an affirmative vote of the vestry there is no authority to make a church-rate, but absence of a vote of the electors does not prevent a Parliamentary election taking place. In Parliamentary elections the question is not, Do you approve of a particular candidate, aye or no; but, Do you prefer any other qualified candidate? If there is no other qualified candidate, there is no mode of opposing the qualified candidate put in nomination, and by your voting for a disqualified candidate after notice, Lord MANSFIELD says, in *Oldknow v. Wainwright*, it is the same as if you did not vote at all.

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But suppose there to be three candidates for a borough returning

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one member, and one of the candidates is disqualified, and certain electors, after notice, vote for him ; if by so doing they have thrown their votes away and are to be deemed as not having voted at all, what is there to preclude them from voting for one of the qualified candidates? The authorities cited import that they may do so, which favours anything rather than the proposition that by the irrelevant vote for the disqualified candidate they excluded themselves from any further interference in the election.

[*811]

But I ask, upon what general principles of law are these rules relating to elections founded? I wish to know where they are to be found. If these cases are supposed to be governed not upon rules peculiarly and only applicable to them, but are also instances of the application of some established general principles of law, reference ought to be made to the depository where these principles are to be found, or other instances in which they have been applied, *ought to be shown. But notwithstanding that ingenuity, much beyond what is ordinarily exhibited in the maintenance of a particular case, has been manifested in support of the present rate, yet these election cases are alone relied upon.

I cannot help thinking, that the circumstance of a number of persons, no doubt respectable in their general character and position, having been so misled as to avow their determination to disobey the law, and to refuse to perform an obligation unquestionably resting upon them, is so extraordinary, that it has called forth much energy to overcome such illegal resistance to the law and duty. But I think the means by which that attempt has been made, if successful, would produce public mischief much beyond that which is sought to be redressed. The subjects of this country are much too right-minded, and estimate too correctly the benefits that result from a general obedience to a law while it exists, and the enormous evil which may result from persons, of the class of the ratepayers of a parish, entering into an open and avowed combination to evade or defy the law, to render it probable that the evil example which has been set will be followed to much extent. But the perversion of the law, by which alone I think this rate has been attempted to be supported, and the adoption by the courts of law of strained analogies and presumptions in favour of an attempt to impose pecuniary burdens under any denomination, are calculated not only to bring discredit upon, and to destroy confidence in the law, but also to produce greater and more permanent evils than that which it is the object of such a course to prevent.

It has been argued, in support of the rate, that it was the duty of the vestry to make a church-rate, and a refusal to make it was unlawful, and that the majority could not compel the minority to do or join in an unlawful act, or to *omit to perform a legal duty, which, it is said, would be the effect of the vote of the majority, unless the right and power of making a rate devolved upon the minority. But surely the fallacy of such reasoning is very obvious. It is only the duty of the minority to use all lawful means in their power to make a church-rate, which they will have done when they shall have voted for a rate. But if the law requires a vote of the majority of the vestry to make a valid rate, the minority is neither guilty of an illegal act, nor guilty of any unlawful omission, because it is coerced and counteracted by the majority to whom the law has confided the power of making the rate. The unlawful act is rather in the attempt, by any men, to assume a power, which the law has not given to them, to make a rate binding others, over whom the law has given them no authority.

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[*812]

The general principle of law being admitted, that the power of making the rate is given to the majority of the vestry, the *onus* of proving the power of the minority, under the circumstances, to make the rate now asserted for the first time, is upon those who make the assertion; and I think no such power has been proved to exist by law. I have thus examined the election cases at length, because they are the only authorities relied upon in support of the rate, and I have anxiously endeavoured to estimate the weight of them, and their application to this case; and having done so, I do not think they ought to be deemed to be authorities for the purpose for which they have been cited. I do not think those cases establish or recognize any principle which can be applied to this case or made the foundation of a decision in support of the rate in question. And further, I am of opinion, that neither principle nor authority has been produced for the doctrine that, by the refusal by the majority of the vestry to make a church-rate when it is their duty, and they are lawfully required to do *so, the power of making the rate devolves upon the minority of the vestry. And I am of opinion, that the libel exhibited in the Consistory Court shows affirmatively that the rate of which it is the object of the suit instituted in that Court to enforce the payment, is an invalid rate.

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The opinion which I have expressed is founded upon the assumption, that the libel is to be construed as importing that the rate was made by the minority of the parishioners in vestry who voted

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against the amendment, which is a construction more favourable for the support of the rate than I think the record warrants. In my opinion, the true construction of the libel imports that the rate was made by the churchwardens and the eighteen parishioners who signed it; and I am satisfied that all opportunity for any one to vote against the rate was studiously excluded.

Upon the view of the case which I have taken, I am prepared respectfully to recommend to your Lordships to reverse the judgment of the Exchequer Chamber and the judgment of the Court of Queen's Bench.

THE LORD CHANCELLOR (LORD CRANWORTH):

My Lords,—Not having had the advantage of hearing the arguments in this case, I do not propose to take any part in the discussion. I rise simply for the purpose of saying that, having followed my noble and learned friend in the very able address which he has made to the House, so far as I can form any opinion, not having heard the arguments, I most entirely concur in what has fallen from him, with, perhaps, one exception. I confess my impression was, when I was a member of the Court of Exchequer Chamber, and the matter was before me then with the other Judges, that there was sufficient on the record to show that the rate had been made by all those who constituted what has been called "the minority." Of course, as I *did not hear the case argued at your Lordships' Bar, I give no opinion at all upon the case, and should have taken no part in it, had it not been that my noble and learned friend Lord BROUGHAM, who did hear this case, but was compelled by ill health to quit London before the matter came under final decision in your Lordships' House, requested me to say that having, by the courtesy of my noble and learned friend, seen the opinion that he was about to give, in moving the judgment of your Lordships' House, he entirely concurs in the whole judgment, with, perhaps, that same qualification which I have stated. He added, that the doubt he expressed as to that point, rather adds to the force of this judgment in respect of the main result, because it excludes the notion of coming to this conclusion upon any other ground than the general ground that the rate must be made by the majority, and that no other rate is valid.

[*814]

*Judgment of the Exchequer Chamber, and judgment
of the Court of Queen's Bench, reversed.*

JEFFERYS v. BOOSEY (1).

(4 H. L. C. 815—896; S. C. 3 C. L. R. 625; 24 L. J. Ex. 81; 1 Jur. N. S. 615; revsg. 6 Ex. 580.)

The object of 8 Anne, c. 19 (2), was to encourage literature among British subjects, which description includes such foreigners as, by residence here, owe the Crown a temporary allegiance; and any such foreigner, first publishing his work here, is an "author" within the meaning of the statute, no matter where his work was composed, or whether he came here solely with a view to its publication.

Copyright commences by publication; if at that time the foreign author is not in this country, he is not a person whom the statute meant to protect.

An Englishman, though resident abroad, will have copyright in a work of his own first published in this country.

B., a foreign musical composer, resident at that time in his own country, assigned to R., another foreigner, also resident there, according to the law of their country, his right in a musical composition of which he was the author, and which was then unpublished. The assignee brought the composition to this country, and, before publication, assigned it, according to the forms required by the law of this country, to an Englishman. The first publication took place in this country:

Held, reversing the judgment of the Court of Exchequer Chamber, that the foreign assignee had not, by the law of this country, any assignable copyright here in this musical composition.

Per Lords BROUGHAM and ST. LEONARDS: Copyright did not exist at common law; it is the creature of statute.

Per Lord ST. LEONARDS: No assignment of copyright under the 8 Anne, c. 19 (2), the benefit of which is claimed by the assignee, although from a foreigner, can be good in this country, unless it is attested by two witnesses.

Per Lord ST. LEONARDS: There cannot be a partial assignment of copyright.

THIS was an action on the case brought in the Court of Exchequer by T. Boosey against C. Jefferys. The declaration *stated that the plaintiff was, and still is, the proprietor of the copyright in a certain book, to wit, a musical composition called, "Come per me sereno," *Recitativo e Cavatina nell' Opera La Sonnambula*, del M. Bellini, which said book had been and was first printed and published in

1854.

Feb. 16, 17,
20.June 29.
Aug. 1.Lord
CRANWORTH,
L.C.Lord
BROUGHAM.Lord ST.
LEONARDS.POLLOCK, C.B.
ALDERSON, B.

PLATT, B.

PARKE, B.

JERVIS, Ch. J.

CROMPTON, J.

WILLIAMS, J.

ERLE, J.

WIGHTMAN,
J.

MAULE, J.

COLERIDGE,
J.

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[*816]

(1) Applied, *Kyle v. Jefferys* (1860) 3 Macq. H. L. C. 611. Observed on, *Emperor of Austria v. Day* (1861) 3 D. F. & J. 217, 30 L. J. Ch. 690. Distinguished, *Routledge v. Low* (1868) L. R. 3 H. L. 100, 37 L. J. Ch. 454, 18 L. T. 874. Referred to, *Morris v. Wright* (1870) L. R. 5 Ch. 279, 284, 22 L. T. 78; *Bonicault v. Chatterton* (1877) 5 Ch. D. 267, 276, 46 L. J. Ch. 305, 35 L. T. 745; *Taylor v. Neville* (1878) 47 L. J. Q. B. 255; *Caird v. Sime* (1887) 12 App. Cas. 326, 343, 57 L. J. P. C. 2, 57 L. T. 634; *Tuck v.*

Priester (1887) 19 Q. B. D. 54, 640, 56 L. J. Q. B. 553, 57 L. T. 110; *Trade Auxiliary Co. v. Middlesborough, &c. Assn.* (1889) 40 Ch. D. 425, 434, 58 L. J. Ch. 293, 60 L. T. 681; *Macleod v. Att.-Gen. of New South Wales* [1891] A. C. 455, 458, 60 L. J. P. C. 55, 65 L. T. 321; *Adam v. British and Foreign S.S. Co.* [1898] 2 Q. B. 430, 433, 67 L. J. Q. B. 844, 79 L. T. 31; *Davidson v. Hill* [1901] 2 K. B. 606, 612, 70 L. J. K. B. 788, 85 L. T. 118.

(2) Repealed, 5 & 6 Vict. c. 45, s. 1.

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England, and within twenty-eight years last past, and which copyright was subsisting at the time of the committing of the grievances, &c. Yet the defendant, contriving to injure the plaintiff, and to deprive him of the gains, &c. which he might, and otherwise would have derived from the said book, and also to deprive him of the benefit of his copyright therein, heretofore and after the passing of a certain Act of Parliament, &c. (the 5 & 6 Vict. c. 45), and within twelve months before the commencement of this suit, to wit, &c. wrongfully, and without the consent in writing of the plaintiff, so being the proprietor of the said copyright, did, in England, unlawfully print and cause to be printed for sale, divers copies of the said book, contrary to the form of the statute. And the defendant further contriving, &c., heretofore and within twelve calendar months next before the commencement of this suit, to wit, &c., did wrongfully, and without the consent in writing of the plaintiff, so being the proprietor of the copyright, unlawfully sell and cause to be sold, and unlawfully publish and cause to be published, and expose to sale and hire, and cause to be exposed to sale and hire, and unlawfully had in his possession divers, &c. copies of the said book, then on those days and times, &c., well knowing the said copies, and each and every of them, to have been unlawfully printed, contrary to the form of the statute. By means, &c. the plaintiff has been hindered and prevented from selling, &c., and his copyright has been and is greatly injured and damnified, to the plaintiff's damage.

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The defendant pleaded, first, that the plaintiff was not *the proprietor of the copyright in manner and form, and secondly, that there was not, at the time of committing the supposed grievance, a subsisting copyright in the book, as alleged.

The plaintiff took issue on these pleas.

The cause came on for trial before Mr. Baron Rolfe, at the sittings after Easter Term, in 1850, when it appeared in evidence that the opera in question was composed at Milan, in February, 1831, by Vincenzo Bellini, an alien, then and since resident in Milan; that by the law of Milan, he was entitled to copyright in this opera, and to assign such copyright; that on the 19th of February, 1831, he did, by an instrument in writing, according to the law of Milan, assign the copyright to Giovanni Ricordi, also an alien, and resident in Milan; that according to the law of Milan, such copyright, and the right of assigning the same, thereby became vested in Ricordi; that on the 9th day of June, 1831, Ricordi being then in London, duly executed, according to the laws of England, an indenture, made

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between himself and the plaintiff, which indenture recited the above facts, and assigned all Ricordi's interest in the copyright in the opera to the plaintiff, but for publication in the United Kingdom only. The plaintiff further proved that he was a native-born subject, resident in England; that the opera was first published by him in London on the 10th June, 1831, and that there had been no previous publication thereof in the British dominions, or in any other country; and on the same day the book was duly registered in the Stationers' Company and copies deposited there according to law. The plaintiff further proved that, on the 13th of May, 1844, he caused a further entry to be made in the registry of the Stationers' Company, for the purposes of the statute passed in the 5 & 6 Vict. c. 45, and these entries were proved in evidence at the trial. Mr. Baron ROLFE *then, in conformity with the decision in *Boosey v. Purday* (1), directed the jury that the matters given in evidence were not sufficient to entitle the plaintiff to a verdict on either of the issues, and that the verdict must be found for the defendant. A bill of exceptions was tendered to this direction. The cause came on to be heard on the bill of exceptions (which set forth the pleadings and facts above stated) before the Judges in the Court of Exchequer Chamber, on the 20th May, 1851, when judgment was given declaring the direction at the trial to be wrong, and a *venire de novo* was awarded (2). A writ of error was then brought in this House.

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The Judges were summoned, and Lord Chief Justice JERVIS, Lord Chief Baron POLLOCK, Mr. Baron PARKE, Mr. Baron ALDERSON, Mr. Justice COLERIDGE, Mr. Justice MAULE, Mr. Justice WIGHTMAN, Mr. Justice ERLE, Mr. Baron PLATT, Mr. Justice WILLIAMS, and Mr. Justice CROMPTON attended.

Mr. Serjt. Byles and Mr. Quain, for the plaintiff in error :

The judgment of the Court below is wrong, for Ricordi possessed no copyright in England, and his assignment passed nothing. It is a generally understood principle, that a municipal law, such as that of copyright, does not extend beyond the limits of the country which enacts it. If the laws of two countries conflict, the decision must be according to universal principles of law, or according to the special law of the country where the suit is prosecuted.

(LORD BROUGHAM : That principle was declared in this House in

(1) 80 R. R. 495 (4 Ex. 145).

(2) 6 Ex. 580.

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Don v. Lippmann (1), the authority of which *has been universally recognized. It is quoted many times by Story.)

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In the United States, the law expressly declares that no person has copyright there but one who is a native of the States, or a resident in them; and it appears doubtful whether he must not be such a resident as may become an American citizen. In this country the law has not been so expressly declared by statute, but the statutes that have been passed upon that subject bear a similar interpretation. Starting from an acknowledged point, the course is perfectly *clear. The case of *Chappell v. Purday* (2) decides that a foreign author resident abroad, whose works are published in this country, has not, under the statutes of 8 Anne, c. 19 (3), and 54 Geo. III. c. 156 (3), any copyright here. That case was decided in 1845, and it was there said: "The general question, whether there was such a right at common law, was elaborately discussed in the great cases of *Millar v. Taylor* (4) and in *Donaldson v. Beckett*" (5). In the latter of these cases, it was distinctly decided that copyright was entirely the creature of the statute,—a decision that was adopted and recognized by Lord KENYON, in *Beckford v. Hood* (6), and seems to be assumed by Lord ELLENBOROUGH, in *The University of Cambridge v. Bryer* (7), and asserted by Lord TENTERDEN, in *White v. Geroch* (8). *Hinton v. Donaldson* (9) was a case in Scotland, that preceded the decision of *Donaldson v. Beckett* in this country, and there twelve of the Judges held that there was no copyright at common law, Lord MONBODDO being the only Judge who took an opposite view of the question. In *Boosey v. Purday* (10), where the facts were the same as here, it was decided that a foreign author domiciled abroad had no copyright in England. That decision, which was, in fact, made after re-considering an opinion to the same effect previously intimated in *Chappell v. Purday* (11), seems to have been misunderstood when the present case was in the Court of Exchequer Chamber.

[*821]

The chief case on the other side is that of *Cocks v. Purday* (12), where the Court of Common Pleas held that *a foreigner, resident

(1) 47 R. R. 1 (5 Cl. & Fin. 1).

(2) 69 R. R. 698 (14 M. & W. 303).

(3) Repealed, 5 & 6 Vict. c. 45, s. 1.

(4) 4 Burr. 2303.

(5) *Id.* 2408; 2 Br. P. C. 129.

(6) 4 R. R. 527 (7 T. R. 620).

(7) 16 East, 317.

(8) 22 R. R. 786 (2 B. & Ald. 298).

(9) Dict. of Decisions, tit. Literary Property, p. 8307; Fol. Dic. v. 3, p. 388.

(10) 80 R. R. 495 (4 Ex. 145).

(11) 69 R. R. 707 (14 M. & W. 319).

(12) 5 C. B. 860.

abroad, might, in a book first published by him in this country, have an English copyright which he could assign to another. That decision was pronounced in 1848. After that came *Boosey v. Davidson* (1), which supported *Cocks v. Purday*, and indeed adopted it as a guiding authority. The question now will be, whether those decisions can be supported.

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The title to copyright is given by statute, and is a right which can only be exercised in England according to the statute. * * There is no dispute here as to Ricordi's Italian copyright, but that does not give the plaintiff any rights in England. Bellini's assignment to Ricordi may, for this part of the argument, be assumed to have passed to Ricordi what Bellini possessed, but that was Italian copyright alone; he did not possess any English copyright, and therefore he could not pass any by assignment. * * In the argument in the Court below, the case of *Gibbon* was referred to, and it was said that he was domiciled at Lausanne, and was for such a purpose a foreigner; but the reference is not in *point, for Gibbon was an English subject, who, though he lived for years at Lausanne, never lost his English domicile. * * And in fact he came here to publish his work.

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(THE LORD CHANCELLOR: Do you admit that if he had established himself at Lausanne, without any *animus revertendi*, he would have lost his rights as an Englishman?)

It is not necessary for the purposes of this case to discuss that question.

(THE LORD CHANCELLOR: I do not say whether that is for you or against you, but it does not appear clear to me that a British subject would lose them.)

He would not; for many purposes a British subject may have two domiciles. * * *

The doctrine in the case of *Donaldson v. Beckett* (2), that no copyright in books existed at common law, has been adopted in the United States, in *Wheaton v. Peters* (3), which, though not an authority here, is evidence of the opinion which eminent Judges, educated in the English law, entertain on the subject. If the right

[823]

(1) 13 Q. B. 257.

(2) 4 Burr. 2408; 2 Br. P. C. 129.

(3) 8 Peters' Rep. in the Supreme Court of the United States, 591.

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existed at common law, it must have existed in perpetuity, which no one would pretend. Before the invention of printing, no man thought of having what is now called copyright even in the letters which he wrote. * * *

[824] There is no trace in the civil law of such a right as to literary compositions ; indeed it seems to have been the other way ; for in the Institutes (1) it is said, that if Titius wrote a song, or a history, or a speech upon my paper, the paper still belonged to me. Literary property is, in truth, a property in ideas only ; it is not the subject of possession or occupation, and therefore never could have been a subject of a common law right ; nor could it exist upon general principles of property ; it could only be created by the express provisions of the legislative power. On this point, the argument of *Mr. Yates* in *Tonson v. Collins* (2) is relied on ; this seems also to have been so considered in France : *Rénouard* (3). * * *

[825] The words used in the statute of Anne are retrospective. They give to the “author of any book or books already printed, who hath not transferred to any other the copy or copies of such book or books,” or to the “bookseller, printer, or other person who hath purchased or acquired the copy or copies of any such book, in order to re-print the same,” the sole right of printing for 21 years. These words are themselves clear evidences of the belief of the Legislature at that time that no such right previously existed, but that it was then for the first time created. * * But if it should still be contended that that statute did not create, but only regulated the rights of an author, it follows that the statute was a substitution for the common law, so that all rights of authors must now be taken to depend entirely on its provisions, and if enforceable, can only be so by an exact observance of those provisions. * * *

[827] The Engraving Acts (4) furnish, by analogy, a reason for saying that the object of the Legislature, in the statute of Anne, was to protect and encourage labour and skill in this country, and that the Legislature did not pretend to interfere with anything that was done abroad : *Page v. Townsend* (5). An Act of Parliament can only be applicable to aliens, or persons out of the dominions of England,

[828] by express words. * * Even if it could be maintained, that

(1) *Vinnii Inst. Lib. II. Tit. I. s. 33, de Scripturâ*. See the French Code Civil, ss. 547 *et seq.*

(2) 1 Sir W. Bl. 301 ; see p. 333 *et seq.*

(3) *Traité des Droits d'Auteurs* (1839).

(4) 8 Geo. II. c. 13 ; 17 Geo. III. c. 57 ; 7 & 8 Vict. c. 12 ; and 15 & 16 Vict. c. 12.

(5) 35 R. R. 174 (5 Sim. 395).

though an Act may not extend to foreigners by words, it may do so in principle, and that that is the case with these Copyright Acts, and if *Cocks v. Purday* (1) should be cited as an authority for the proposition, then the answer is, that the exception to any such principle exists in the case of copyright of books; for it is admitted, that if a foreign author first publishes his work abroad, it is, by the law here, *publici juris*, and his subsequent publication of it here cannot, under any circumstances, give him a copyright in this country.

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Then, as to the form of the assignment; if Bellini or Ricordi did possess copyright in this country, assignable here, it must have been by virtue of the laws existing in this country, and consequently the forms of those laws must have been observed, in order to make the assignment from the one to the other of them valid. If so, then this assignment is void, as not being attested by two witnesses, *Davidson v. Bohn* (2), *Power v. Walker* (3).

(THE LORD CHANCELLOR: The assignment is stated in the bill of exceptions to have been validly executed according to the law of Milan. What is the effect of that here?)

It could not be enforced here. The bill of exceptions should have alleged an assignment valid by the law of England. If the argument that the right exists under our law of copyright is well founded, then the assignment comes within the principles of our law, which having created it must govern its enjoyment; it must be executed in the form required by the law of this country, and it must also be alleged to have been so executed. * * *

Another point arising on the bill of exceptions is, that it does not there appear that it was ever the intention of Bellini to pass an English copyright at all. It is merely alleged that by the law of Milan he was entitled to copyright, and that by that law he assigned to Ricordi his interest in such copyright, and the right of transferring the same. But all that is so stated refers to the law of Milan alone, and, for anything that appears in the bill of exceptions, the only agreement was, that Ricordi should possess in Milan the rights which Bellini possessed there; not that Bellini pretended to give, or Ricordi to purchase, all the rights which Bellini himself might, by possibility, be entitled to claim elsewhere.

[829]

(1) 5 C. B. 860.

(2) 6 C. B. 456.

(3) 15 R. R. 378 (3 M. & S. 7). See

also *Clementi v. Walker*, 26 R. R. 569
(2 B. & C. 861).

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Lastly, English copyright extends all over the British dominions : 54 Geo. III. c. 156 (1) ; is an indivisible thing, and part of it alone cannot be assigned : *Davidson v. Bohn* (2) : here the assignment was only made for the United Kingdom, and therefore, being only an assignment of part of the right which Ricordi professed to have received by transfer from Bellini, was bad.

Sir F. Kelly and Mr. Bovill (*Mr. Raymond* was with them), for the defendant in error :

The construction here sought to be given to the statute of Anne, can only be given by introducing the qualifying words "British-born subjects," or "subjects of Great Britain," the introduction of which would occasion confusion and injustice, and would have this operation, that a foreigner who should come here permanently to reside, and should then become the author of an immortal work, would be refused a title to copyright. Such a consequence, though *implied in the judgment of the Court of Exchequer in *Boosey v. Purday* (3), certainly never was intended, and yet it follows necessarily, from the argument, that the statute of Anne applies only to British-born subjects. * * *

(THE LORD CHANCELLOR: The question here is not of an international kind, but is whether, under the circumstances of this case, the statute of Anne has secured to the assignee a copyright property.)

It must be assumed, as stated in the special verdict, that Ricordi came here clothed with all the rights which the law of Milan could give him in his own country. Of what value are those rights here is now the question. It is submitted that the moment Ricordi arrived here, he stood in the same situation as the foreign author himself. He brought with him something which our law recognises as property, and there is no distinction between property in the hands of an alien, and in the hands of a British subject. The law of this country came into operation both upon his person and his property ; and Ricordi being, for the purposes of our law, the author, and being present in this country, had the right of exclusive publication of his work, and could assign that right to any other person in this country. * * The protection of our law cannot be confined to the mere substantive property of the foreigner, but

(1) Repealed, 5 & 6 Vict. c. 45, s. 1.

(3) 80 R. R. 495 (4 Ex. 145).

(2) 6 C. B. 456 ; per MAULE, J. 458.

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extends to all his personal rights. Property in a patent may be held in trust for a foreigner: *Beard v. Egerton* (1). If Ricordi had brought pictures here, no one could say that the pictures would be protected from injury, but that he himself had no legal right to deal with those pictures as his property. Our law, indeed, not only protects him and his property while here, but it so fully recognises his personal rights, that it protects his character, as property, even while he is abroad, and when he has never been in the country: *Pisani v. Lawson* (2). * * It is not because the forms of enforcing the right may be different in our country from what they are in another, that therefore the right itself does not exist. Take the analogy of bills of exchange; they are not presentable on certain days in Milan; but if a Milan bill of exchange is brought here, the law of England attaches upon it; it becomes presentable according to the law of this country, the rights of *the holder here being quite unaffected by that difference of law in England and Milan, which is in fact a mere matter of regulation.

[*832]

The question arises here whether copyright existed in this country before the statute of Anne. That it did so, is shown by the case of *Roper v. Streater* (3), although, of course, that question is not very material, since the right of the defendant in error must now be regulated by that statute; but still it is of some importance, as leading to a conclusion as to what was the intention of the Legislature in passing that statute, and what was the state of the law on which that statute was to operate. That statute was avowedly passed for the encouragement of learning.

(LORD BROUGHAM: Do you read it thus,—for the encouragement of learning all over the world.)

No. But whoever possesses and uses learning here, to that man the statute applies, if he gives this country the benefit of its first production. * * *

(LORD BROUGHAM: In former times were Irish editions of English books imported into this country, on being proceeded against as piracies? (4))

Nothing is known on that subject. But that question itself shows

(1) 71 R. R. 291 (3 C. B. 97).

(4) *Sic.* Perhaps we should read

(2) 54 R. R. 738 (6 Bing. N. C. 90).

“on being imported into this country, proceeded against as piracies.—W. B.

(3) *Skin.* 234; referred to in 4 Burr.
2316.

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the dangerous consequence of constructively introducing into a statute words which may have the effect *of giving a peculiar meaning to certain of its provisions. The words in the statute are, "any author of any book," which must mean every author of every book. What is the difference, as to any principle of justice, between a book, a picture, and a machine? Suppose these words had been, not "the author of any book," but "the projector, inventor, maker, or manufacturer of any machine hereafter to be invented and manufactured;" would or would not those words apply to foreigners? If they would, why will not those now in the statute apply to authors?

(THE LORD CHANCELLOR: A picture is analogous to a manuscript; but a picture cannot be indefinitely multiplied. In order to resemble the printing of a book, your analogy must be confined to things that can be so multiplied; an engraving would be the same as a book; but that is arguing *idem per idem*.)

The right of property in the book is the first thing to be established; that being admitted, then the other right, that of exclusively multiplying copies, grows out of it. What are the analogies furnished by other statutes? take the Patent Acts; the words are, "The first and true inventors of such manufacture." * * *

[*834] (LORD ST. LEONARDS: Assume that the common law gave the right; that right, whatever it was, was taken away by the statute of Anne, and certain privileges, not before existing, *were then given. But assuming copyright to exist at common law, would you say that the common law applied to foreigners?)

If the right existed at common law, every one, whether foreign or native, would be entitled to the benefit of it, when either the man, or the property which was the subject of the law, was in this country: it was a right attaching on the property; and as soon as the property was here, the law operated upon it.

(THE LORD CHANCELLOR: Assuming that to be so; suppose the composition of Bellini sent by him to Boosey, and first published by Boosey, and then pirated, who would be the person to complain of the piracy, Bellini or Boosey?)

Boosey, who was the owner of the right by purchase; the right attaches on the property; the man, the creator of the property, is

not required to be resident here. Byron wrote many of his works abroad ; Murray bought them ; the copyright was in Murray.

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(THE LORD CHANCELLOR: Do those who maintain that there was a common law right, say that that right was capable of transfer ; if so, what was the form of transfer at common law ?)

There might, perhaps, be some difficulty about the form of the transfer ; but the right to transfer existed ; then the form of making it would be analogous to what was used with relation to other things.

(THE LORD CHANCELLOR: Is there an instance of property of this sort being claimed before the statute of Anne ?)

All the cases, from the earliest times, show that there existed in the author of any work, and in the purchaser from the author, an absolute right of property : *Roper v. Streater* (1). An *Anonymous* case, referred to in *The *Stationers' Company v. Seymour* (2), *The Duke of Queensberry v. Shebbeare* (3), and *Prince Albert v. Strange* (4), and in some, especially the last of these cases, the existence of that property was recognised altogether independently of any intention to publish. An alien friend possesses this right as much as a British subject. There is nothing in the terms of the statute which expressly limits the right to a British subject ; that was assumed and determined for more than a century. There is only one case which really raises a doubt upon the subject. Take the cases that appear to be opposed to the right, and it will be found that they are so in appearance only. In *Delondre v. Shaw* (5), protection was refused to a medicine manufactured abroad, and a label printed abroad ; but the ground of the decision there was, that the plaintiff had no interest except in the copyright of the printed seal, and that was something which was printed and published abroad, and was therefore not the subject of the copyright by the law of this country. * * *Page v. Townsend* (6) is the next case, and that merely decided that prints engraved and struck off abroad, but published here, were not protected from piracy ; but that was because of the express words contained in the 17 Geo. III. c. 57. Then came *Chappell v. Purday* (7), and there again the question

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[*836]

(1) Skin. 234 ; 4 Burr. 2316.

(2) 1 Mod. 257.

(3) 2 Eden, 329 ; 4 Burr. 2330.

(4) 79 R. R. 307, 334 (1 Mac. & G. 25).

(5) 2 Sim. 237.

(6) 35 R. R. 174 (5 Sim. 395).

(7) 69 R. R. 698 (14 M. & W. 303).

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did not properly arise, for the overture sought to be made copy-right was first published on the continent. *Boosey v. Purday* (1), which is the last of these cases, is the only one in point against the defendant in error.

(THE LORD CHANCELLOR: The arguments of the Judges in that case may be commented on without reserve; for that case is not a direct authority, since the action, in the present case, was commenced, and the case was brought to this House finally to determine the question which was there decided.)

If so, then there is no authority whatever for the proposition that copyright does not exist in the work of a foreign author first published by him in England. Then what are the reasons given for the judgment which denies his right? It is there said (2) that the object of the Legislature was not to encourage the first publication of foreign books in this country, but the cultivation of the intellect of its own subjects, to "encourage learned men to compose and write useful books," as if the first publication here of learned works composed by anybody would not have that effect; and the reward is stated to be "the monopoly of their works for a certain period, dating from their first publication," as if that reward would not be secured to them, whatever was the cause which stimulated them to write, whether the desire to enforce or to oppose the opinions of a native or of a foreign author. In these two assertions, which do not amount to reasoning, lies the whole pith of that judgment. On the other side, there are numerous *and well-considered authorities to the effect that the works of a foreigner first published in this country thereby obtain copyright: *Bach v. Longman* (3) is the first of them. There the question was, whether a musical composition was a book within the statute of Anne? a question that never could have arisen if the works of a foreigner had not been deemed entitled to protection under that statute.

['837]

(THE LORD CHANCELLOR: That foreigner was resident in this country at the time of publication, and had obtained letters patent for his publication.)

That was so, and the case therefore shows that, both as to the statutes of James and Anne, a foreigner was not, as such, excluded

(1) 80 R. R. 495 (4 Ex. 145).

(3) Cowp. 623.

(2) 80 R. R. 504 (4 Ex. 157).

from their benefit. Then came the case of *Tonson v. Collins* (1). There the question of copyright was carefully considered, and even *Mr. Thurlow*, in arguing against it, admitted (2), that "it is of no consequence whether the author is a natural-born subject, because this right of property, if any, is personal, and may be acquired by aliens." The point was not absolutely decided in that case; but it is clear that it was discussed and considered. So matters remained till the case of *Clementi v. Walker* (3), where the decision came to could not have occurred if the fact of the author being a foreigner had been an answer to the claim. That it was not so, is proved by *Guichard v. Mori* (4), where Lord Chancellor BROUGHAM refused an injunction, because, in fact, there had been a publication abroad before there was any publication in this country; but at the same time his Lordship said, "The policy of our law, recognises by statutes, express in their wording, that the importation of foreign *inventions shall be encouraged in the same manner as the inventions made in this country, and by natives. This is founded as well upon reason, sense, and justice, as it is upon policy." * * Then came the case of *Bentley v. Foster* (5). There the Judge was Vice-Chancellor SHADWELL, and his *dictum* in *Delondre v. Shaw* was cited to him; but he held that, "protection was given, by the law of copyright, to a work first published in this country, whether it was written abroad by a foreigner or not." As the question, however, was a legal one, he directed an action, which was brought, and the defendant, without further contesting the right of the plaintiff, consented to a verdict. In *D'Almaine v. Boosey* (6), it was held that the English assignee of the copyright of a foreign musical composer was within the protection of the statute, and thus in all these cases the right was admitted, and acted on. The case of *Cocks v. Purday* (7) was the next—

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(THE LORD CHANCELLOR: The point as to publication abroad is put too broadly there.)

But still the general rule is clearly stated, that an alien may acquire personal rights here with respect to property in this country. If that is a fixed principle of law, why should a book alone constitute the exception to it? A foreigner may maintain an

(1) 1 Sir W. Bl. 301.

(2) *Id.* 306.

(3) 26 R. R. 569 (2 B. & C. 861).

(4) (1831) 9 L. J. Ch. 227.

(5) 10 Sim. 329.

(6) 41 R. R. 273 (1 Y. & C. (Ex) 288).

(7) 5 C. B. 860.

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action for property here, and even for an injury to his reputation : *Pisani v. Lawson* (1); *and *Boosey v. Davidson* (2) fully recognised the right of a foreigner to copyright in this country, on the sole condition of first publication here, while *Ollendorf v. Black* (3) decided that a foreigner, who was a mere temporary resident in England, was entitled to the usual injunction, if his work was pirated.

Then as to the question of assignment. It is not contended that what was done in Milan was of itself valid here; but that what was done there, vested complete legal rights in Ricordi; he came to this country fully entitled, as the author would have been, to publish, or to withhold publication. Having here the rights of the author, he transferred them to Boosey by forms valid according to the law of this country. Now the law of England operates only on persons, things, and acts in this country: the property being here, our law will not inquire whether it was acquired abroad by forms such as are familiar to the law of England. If it was validly acquired there, it is protected here, and the bill of exceptions states it to have been so acquired. Besides which, the statute of Anne refers to assignment after publication, and it has never been decided that an assignment by an author made before publication, must be attested by two witnesses.

(THE LORD CHANCELLOR: There is no doubt about the general principle, that property may be transferred according to the law of the place where the transfer is made; but here is a peculiar property, the creature of a particular statute: then the question is, whether that can be transferred at Milan, so as to give, to an assignee there, all the rights which an author alone could enjoy here under the provisions of the statute which created the property.)

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It is admitted that the forms of the statute must be observed; but that is only in this country; and if the statute had said that no property should pass from the author, wherever he resided, except by an instrument attested by two witnesses, then, though contrary to general principles, such an enactment must have full effect. But the Act here does not say so; it does not even refer to an assignment before publication; and the statute 54 Geo. III. c. 156 (4), does not require witnesses at all, but only a contract in writing,

(1) 54 E. R. 738 (6 Bing. N. C. 90). 20 L. J. Ch. 165).

(2) 13 Q. B. 257.

(4) Repealed, 5 & 6 Vict. c. 45, s. 1.

(3) 87 R. R. 353 (4 De G. & Sm. 209;

which certainly was given here. The statement that this property is entirely the creature of statute is not admitted. The property does not differ from any other property. All that has to be determined here is, whether the man here is in possession of the property here? If he is, the law operates on both, and the Court has nothing to do with the form by which he became possessed of it at Milan. Ricordi had purchased it; he had it here, and he assigned it by the laws of this country, which laws can only operate on the assignment that took place in this country.

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It is not correct to say that this was an assignment, not of English, but of Austrian copyright only. It was an assignment of all that Ricordi possessed in this country, and that was the exclusive right of publication here. The Legislature gives the privilege of copyright to the first publisher; it is his reward for first publication. The composition was first published here by Boosey. No other person could have had the copyright. He purchased from Ricordi all the rights which Ricordi possessed, and he observed all the forms which the law requires to be observed, in order to give effect to them.

As to the last objection, that this was only an assignment of a part of the copyright, it is clear that it was an assignment of the whole right which Ricordi possessed here, and *which was secured by English laws, or could be transferred under their authority.

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Mr. Serjeant Byles, in reply :

The benefit of the statute of Anne, if meant to be given to foreign authors, was given only to such as should, at the time of publication, be domiciled in this country.

This case is not like that of a watch, or a picture, brought to this country; for in each of those cases there would be substantive property in possession; here the claim is one of a right, which does not depend on universal principles of law, but is entirely the creature of statute. The case of *Roper v. Streater* (1) is very loosely reported, and cannot at all be relied on; besides which, the author, and the person who purchased from him, were both Englishmen. There is no analogy between the patent law and the copyright law. The former expressly gives the right to the "first or true inventor," without restricting the expression in any way; but in the Copyright Act the importer of a book, already

(1) Skin. 234.

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printed abroad, such as the 7th section refers to, is the only person who answers to the inventor, and there is no doubt that the first importer of a book published abroad would not have copyright in it here, except he could bring himself within the International Copyright Acts.

THE LORD CHANCELLOR:

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I think your Lordships will concur with me, that although this case itself relates only to something of extremely small value, namely, the copyright of a part only of a particular opera, yet that the question is of the very greatest importance, and therefore you will not regret that the argument has occupied a considerable portion of time. As we have had the assistance *of the learned Judges, and shall have the benefit of their opinion upon this case, I shall abstain, studiously and purposely, from making any observations as to the impression which the arguments have made upon my mind. I will merely call your attention to the fact, that the case comes before this House upon a writ of error, from a bill of exceptions, in the case of *Boosey v. Jefferys*. I myself was the presiding Judge at the time that case was tried; but as far as relates to myself, I ruled it in conformity (as I was bound to do, whether right or wrong) to what had been previously decided by the Court of Exchequer. In truth, it was almost agreed that that course should be taken, as it was impossible to bring the case of *Boosey v. Purday* to this House on the then state of the record. This action of *Boosey v. Jefferys*, as it stood below, was therefore brought in order that the matter might come by way of appeal to this House. That there are conflicting authorities upon this subject is a matter beyond doubt; they are not very numerous, and, none very distinctly applying to this particular point, it was thought extremely fit that the matter should be brought before your Lordships as the court of ultimate resort.

What I propose, under these circumstances, is, that certain questions, which appear to me to exhaust the case, shall be submitted to the learned Judges. In the first place, Whether the statute of Anne, or the common law, as far as the statute enforced it, with reference to copyright, extends to foreigners while domiciled and living abroad, and there composing their works? Whether foreigners, under such circumstances, can confer upon any person in this country a copyright against others of her Majesty's subjects? Supposing they cannot do so under any

circumstances, nothing further is to be discussed; but if that can be done under any circumstances, then there *will arise a number of minor questions. Whether an author can assign, by the laws of his own country, something that shall give a right in his own country to the assignee there, so as to enable that assignee to transfer his right to this country, the assignee not being called, under any circumstances, the author; he is the assignee of the author, and not the author himself? Whether or not an assignment can be made in the mode in which this assignment purports to have been made, that is, to give a right not to a copyright generally, but only to a copyright limited to a particular district of the world, namely, this country? There are certain other minor points which will arise, but which, I think, will be exhausted by the questions which I shall propose to be submitted to the learned Judges. If your Lordships concur, I propose that this statement should be made to the learned Judges, with the questions, for their opinions.

“Firstly, Vincenzo Bellini, being an alien friend, while living at Milan, composed a literary work, in which, by the laws there in force, he had a certain copyright.” I purposely propose it in that form, because no evidence has been offered with reference to the extent of copyright at Milan, and therefore I know nothing about it. “He there, on the 19th of February, 1831” (it is necessary to state the dates, in order to show to what statutes the attention of the learned Judges must be directed), “by an instrument in writing, bearing date on that day, not executed in the presence of or attested by two witnesses, made an assignment of that copyright to Giovanni Ricordi, which assignment was valid by the laws there in force. Ricordi afterwards came to this country, and on the 9th of June, 1831, by a deed under his hand and seal, bearing date on that day, executed by him in the presence of and attested by two witnesses”—I need not point out to your *Lordships the circumstance of the absence of the witnesses in the one case, and the presence of the witnesses in the other; I advert to it in order to raise the question, Whether the statute of Anne, which requires two witnesses, extended, or did not extend, to an assignment, which was valid by the laws of the country where it was made, but which was made according to the laws of that country alone, and had not two witnesses, as required in this country—“for a valuable consideration, assigned the copyright in the said work to the defendant in error, his executors, administrators, and assigns, but for

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publication in the United Kingdom only. The said defendant then printed and published the work in this country before any publication abroad. The plaintiff in error, without any license from the defendant in error, then printed and published the same work in this country. Did this publication by the said plaintiff give to the said defendant any right of action against him?"

"Secondly." I propose to ask the learned Judges, "If the assignment to Ricordi had been made by deed, under the hand and seal of Bellini, attested by two witnesses, would that have made any, and what difference?" That is, if the assignment, which was valid according to the laws of Milan, had been also valid according to the exigency of the statute of Anne, would that have made any difference?

"Thirdly. If Bellini, instead of assigning to Ricordi, had, while living at Milan, assigned to the defendant in error all his copyright, by deed, similar in all respects to that executed by Ricordi, would that have made any, and what difference?" This question is for the purpose of obtaining the opinion of the learned Judges (supposing they should think that the intermediate possession by Ricordi, who was also an alien, did affect the question) as to what would have been the case if the foreign author had himself assigned?

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"Fourthly. If the work had been printed and published at Milan, before the assignment to the defendant, would that have made any, and what difference?" That question, my Lords, perhaps does not actually and of necessity arise in the present case; but it may be as well that the subject should be exhausted, because many arguments have been pressed as to whether or not publication abroad is the making a matter *publici juris*, and whether that has any, and what bearing upon the case. I therefore propose to ask the learned Judges whether it would have made any difference if the work had been published at Milan first, before the assignment?

"Fifthly. If the work had been printed and published at Milan, after the assignment to the defendant, but before any publication in this country, would that have made any, and what difference?"

"Sixthly. If the assignment to the defendant had not contained the limitation as to publication in this country, would that have made any, and what difference?"

"Lastly. Looking to the record as set out in the bill of exceptions, was the learned Judge who tried the cause right in directing the jury to find a verdict for the defendant?" I propose, with your

Lordships' concurrence, that these questions be submitted to the learned Judges.

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LORD BROUGHAM :

My Lords,—I entirely agree with my noble and learned friend in the view which he has taken of this case, and also in the propriety of our abstaining from indicating in any way any impression which has been made upon us by the arguments of the learned counsel. I think these questions, which are proposed to be put to the learned Judges, will exhaust the subject.

THE LORD CHANCELLOR :

My noble and learned friend on my right suggests to me to add to the words, "a certain *copyright," the words, "the nature and extent of which did not appear" (1).

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MR. JUSTICE CROMPTON :

June 29.

The answers to the questions proposed by your Lordships in this case, seem to me entirely to depend upon the construction to be put upon the statutes relating to copyright in this kingdom. And I do not think it necessary to enter into the question as to the effect which the decision of this case may have upon our literary relations with other countries. Nor does it appear to me at all necessary to enter into the much-disputed question, as to whether the statute of Anne created a new right, or was an abridgment of an old one. Whatever was its origin, the right must now, I think, be taken to exist only as bounded and regulated by that and the subsequent statutes, and for the term, "and no longer," (to use the phrase of the statute), than mentioned therein, according to the words of Lord KENYON, in *Beckford v. Hood* (2), when speaking of the result of the discussion which terminated in the decision of this House in the great copyright case of *Donaldson v. Beckett* (3); "but the other opinion finally prevailed, which established that the right was confined to the times limited by the Act of Parliament."

It is not necessary either to consider the question as to the rights of an author as against parties having illegally or surreptitiously taken or used his manuscript or copies. Such rights must not be confounded with the copyright now under discussion, the creation of or limited by the statutes.

(1) This, however, was not ultimately done. See Judges' opinions.

(2) 4 R. B. 527 (7 T. B. 620).

(3) 4 Burr. 2408; 2 Br. P. C. 129.

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It was not disputed at the Bar, and may be assumed also, that copyright, being a monopoly, or right of excluding persons from publishing in this kingdom, is local in its nature, and has no extra-territorial force. It is the creation of our municipal law, and to be acquired only in the manner and by the persons pointed out by that law, and is not a property derived or carried out of any general right of property or foreign copyright. It will be necessary, therefore, to consider by whom, and in what manner, a right to copyright, in this country, can be acquired or become vested, according to the Statutes of Copyright.

By those statutes, the monopoly is vested in the author or his assigns, for the limited term after first publication. This first publication is the commencement and foundation of the right, the *terminus à quo* the period of the existence of the right is to run, and a condition precedent to the existence of the right.

In *Beckford v. Hood*, which I have before referred to, and which was decided not very long after the great case in the House of Lords, the declaration averred the infringement as being within the period after the first publication; and Lord KENYON, in saying that it was established that the right was confined to the times limited by the statute, in effect, treated the act of first publication, from which such time was to run, as a condition precedent to the existence of the right.

[*848] It was held in *Clementi v. Walker* (1), on perfectly satisfactory grounds, and is plainly to be collected from the statute, that by the first publication is meant a publication in this kingdom,—and the main question in the present case is, whether the right to acquire the monopoly by a *bonâ fide* first publication here, is confined to persons who *are British subjects either by birth or Act of Parliament, or as owing temporary allegiance here by virtue of their residence in this country. In *Clementi v. Walker* no such restriction as is now contended for, appears to have at all entered into the contemplation of either the Bar or the Court. Such a doctrine would have been at once decisive of the cause, and would have rendered it unnecessary for the Judges to consider the question on which they decided. In deciding that a prior publication abroad by a foreign author, not followed up by a publication here in a reasonable time, destroyed any right in the foreign author, and in doubting what would be the effect of such prior publication abroad, if followed up by a publication here within a reasonable time, the Court of King's

(1) 26 R. R. 569 (2 B. & C. 861).

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Bench seems rather to have recognized the general right of a foreign author to become the first publisher here within the statutes, than to have supposed such right to be confined to British authors publishing here. It seems admitted that an *alien amy*, residing here under the protection of, and subject to our laws, would be a person entitled to publish his works so as to entitle himself to a monopoly; and it is not pretended that a residence abroad by an English subject, or the fact of the work having been composed abroad, either by an Englishman or a foreigner, would have the effect of preventing the author from acquiring a copyright. It is said, however, that the party to acquire a copyright must be, when he publishes, a British subject by birth or by residence here. According to this argument, a foreigner residing at Calais, and composing a work there upon an English subject, and for the English reading market, could not write to his agent in London to publish it so as to acquire copyright, but might acquire it by crossing to Dover, and sending his work from that place to be published in London during his stay in this country. The *only words in the statute from which any such intention as is contended for, can be supposed to be implied, are in that part of the preamble which speaks of the detriment to the authors and proprietors, and the ruin of their families, and of the encouragement to learned men to compose and write. I cannot think that these words evince a sufficiently strong intention to confine the benefits of the statute to authors who are British subjects by birth or residence; and I do not find anything which is sufficiently clear to satisfy me that the Legislature has expressed any intention to restrict the protection given, further than as decided in the case of *Clementi v. Walker*, that the statute must be considered as legislating upon what is really a British publication; and I think that, provided the publication is really and *bonâ fide* British, the copyright may be acquired, although the author is foreign, although he resides abroad, and although he does not personally come to England to publish. I come to this opinion on the words of the statute, vesting the right in the authors or their assigns from the first publication; and from not finding anything in the Acts to exclude friendly foreigners from its advantage. Works of a foreign author so published, seem to me within the clauses requiring the delivery of copies to our public institutions. If the statute is to be read as if the word "British" was inserted before the word "author," it would seem also necessary to insert it before the word "assigns," for otherwise a British author

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could not by assignment give to a foreigner the right of publishing under the statute; such foreigner could not pass any right even to a British subject, and there would be created by the statute a species of personal property which an alien friend would be incapacitated from taking, contrary to the general rule of law. I am unwilling to introduce words into an Act of Parliament, without being able to see a manifest *intention of the Legislature much more clearly than I can do in this case.

If it should be said, why is the publication to be construed to mean a British publication, and the author not to be construed a British author, and the composition a British composition, the answer seems to me to be, that the publication being made the commencement of the term from which the monopoly is to run, and that publication giving rights confined to Britain, and the enactments as to the entry at Stationers' Hall before the rights as to the penalties were to attach, and the obligation imposed of delivering copies to British Institutions, together with the authority of *Clementi v. Walker*, satisfactorily show that the publication must be intended to be in England, whilst there seems nothing in the Act to show that the Legislature in using the words "authors" and "assigns" had any intention of making any restriction as to the place of composition, or as to any personal capacity of the author or assignee. I am by no means satisfied that if the case had occurred to the Legislature of a foreigner composing a work for the English market in France, and sending it over to be really and *bonâ fide* published here, such a work would have been excluded from the benefits and obligations of the Act. There is no authority until the one now under discussion to show that such is the construction of the statute; and taking the authorities altogether, they are, upon the whole, more against than in favour of such a construction. And though the balance of authority may not perhaps be so much in favour of the right as to prevent a court of error from taking a contrary view, that balance is certainly in favour of the decision of the Exchequer Chamber. And it seems probable that the present objection, if good, would have been taken in cases which neither Judges nor counsel have thought worth raising.

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It is said that the Legislature must be supposed to have contemplated English authors and English assignees. An argument of this nature was pressed with much greater ground, as it appears to me, but without success, in a class of cases which arose as to the construction of the statute passed in the same reign as the Copyright

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Act of Queen Anne, to give a right of action upon promissory notes, and to make them indorsable. The statute saying that such notes shall have the force of inland bills, and shall be indorsable like inland bills, it was argued, as here, that the Legislature must be intended to have been legislating about English notes and English indorsements, and this argument was considerably strengthened by the statute using the words "as in the case of inland bills," from which there might be reason to suppose that the Legislature was speaking of a subject-matter in England, and making what could not have been before negotiable in England available as negotiable English securities. It was accordingly urged in different cases, first, that the Act did not refer to the case of a note made abroad, and in another case to a note indorsed abroad; but the general words of the statute were held to prevail, and it was established that the Act might well apply to notes made abroad, and to indorsements abroad: *Bentley v. Northhouse* (1), *Milne v. Graham* (2), and *De la Chaumette v. The Bank of England* (3).

I find reasons in the Act, as well as authority, for thinking that the publication means a publication in England; but I find no words to show, and no reason or authority for thinking that the Legislature meant to make any restriction with reference to the capacity of the author or the assignee. There may no doubt be cases, such as where the Legislature is imposing a tax by way of legacy duty or *otherwise, in which the very subject-matter of the enactment would show it to be absurd to apply the provision to a foreigner residing and domiciled abroad. The question must always be, whether, in the particular case under discussion, any such absurdity or manifest intention appears, and in this case I see no absurdity in giving the right to a foreigner having his work *bonâ fide* first published here, nor any manifest intention in the Legislature to restrict the benefit of the Act to a British-born subject. It does not seem a sufficient argument for giving the restricted sense contended for to the general words of the statute, to assert that the Legislature must be taken to have been legislating as to British authors only, or that it would not have been likely in the reign of Queen Anne for the law to show any favour to foreign productions. In truth it is not to them as foreign productions, but as English publications, that the protection seems to be afforded.

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The doctrine of a prior publication abroad destroying the right

(1) Moo. & Mal. 66.

(3) 36 R. R. 599 (2 B. & Ad. 385).

(2) 1 B. & O. 192.

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of the foreign author to publish here, so as to acquire English copyright, appears to me to rest upon a satisfactory ground. When the work has been made public abroad, there is no statute which makes that publication the commencement of the right of monopoly here; and the work becoming *publici juris* here, and it being once lawful for any one to publish it in England, it would be impossible to hold that a subsequent publication here was a first publication within the meaning of the Act, so as to give a monopoly which would make unlawful the continuing to publish what had once been *publici juris*, and might have been lawfully published here.

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My opinion therefore is, that a foreigner residing and composing abroad, is not prevented by anything in our copyright statutes from acquiring a monopoly if he sends over his work to be published first in England, and it is *really and *bonâ fide* first published here as an English publication. I think also that the assignee of the foreign author, though himself a foreigner, has the same right of acquiring the monopoly by a first publication in this country. The statute of Anne clearly contemplates a first publication by the assignee as sufficient to give him the monopoly—and, in point of fact, I believe that nothing is more common than that the book-sellers should take an assignment of the copyright, and publish themselves as proprietors, so as to vest the monopoly in them during the term. The words of the statute, that the author or his assignee shall have the sole liberty, &c., from the day of the first publication, seem to me to show that the assignee may himself publish, so as to acquire the copyright, and I see no reason why an alien friend should not have this right.

I agree, however, with the argument of the counsel for the plaintiff in error, that no person can have this right as assignee who is not assignee under the provisions of the statute. The right to be gained under the assignment being local in its nature, and being the creation of or regulated entirely by our statute law, the assignment must, I think, be such as our law requires in such a case, whether the execution of the instrument takes place in this country or abroad. The statute of Anne has been construed as meaning by assignee, a person to whom an assignment has been made by writing attested by two witnesses, and I should be sorry to advise your Lordships to disregard a decision which has been so long acquiesced in and acted upon, especially when it was recognised and acted upon in the recent case of *Davidson v. Bohn* (1). I

think, however, that since the Act of 54 Geo. III. c. 156 (1), the attestation by two witnesses has become no longer necessary to the validity of an assignment of copyright. The case *of *Power v. Walker* (2), was decided in June, 1814, and in the next month, the statute of 54 Geo. III. c. 156 (1), was passed, which makes the consent in writing necessary, but does not require any attestation. This seems to have been an intentional alteration of the law. The case of *Power v. Walker* must be taken as establishing that the construction of the statute of Anne is, that as the licence or consent of the proprietor is to be by writing, attested by two witnesses, the assignment, which is a greater thing, must also, *à fortiori*, have been intended to be by writing attested by two witnesses. I will not stop to inquire how far such a doctrine, if now propounded for the first time, might or might not be satisfactory. But when the Legislature, immediately after the decision, re-enacted the same provision in the same words as to publishing without consent in writing, but omitted the provision making the attestation by two witnesses necessary, I think that the same construction leads to the conclusion that the assignment need not now be attested. It would be impossible to say that the action on the case mentioned in the 54 Geo. III., would lie, or that an action for the penalties could be maintained since that statute, if there had been the assent of the author in writing, although not attested, and I think that the necessity for an assignment in writing attested by two witnesses, which arose only from the construction put upon the words of that provision of the statute of Anne, was put an end to by the 54 Geo. III. c. 156 (1), and that the assignment need now only be in writing. I should observe, that the 54 Geo. III. was not referred to in the case of *Davidson v. Bohn*, which appears to me properly decided according to the authority of *Power v. Walker*, as to the publication where there was no assignment in writing, but not to have been right, owing *to the 54 Geo. III. not having been brought to the notice of the Court, as to the publication assigned in writing, but without the attestation required by the statute of Anne, but not required, as I think, by the 54 Geo. III. The conclusion, therefore, at which I arrive, is, that an author being an *alien amicus* may acquire a copyright here if he first publishes here, though he is not personally here, provided that his first publication here is prior to any publication abroad, although he does not himself bring over his work either in manuscript or in his head. And that, under the

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(1) Repealed, 5 & 6 Vict. c. 45, s. 1.

(2) 15 R. R. 378 (3 M. & S. 7).

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same restriction, a foreign assignee of such foreign author may acquire a copyright here, if he is an assignee under an assignment executed according to the provisions of our statutes regulating such assignments. I should add, in reference to the answers which I shall have to give to some of the questions proposed by your Lordships, that the assignment must be such as will in its terms comprehend the English copyright in question.

I have now to apply the conclusions at which I have arrived to the questions proposed by your Lordships in detail.

To the first of your Lordships' questions I answer, that although, on the state of facts assumed, Bellini appears to me an author who might have sent his work over here for first publication, yet that it does not sufficiently appear that there was any sufficient assignment of his right to publish, so as to obtain English copyright. It is stated with reference to the first question that Bellini had by the law of Milan, a right to a certain copyright, by which I understand some copyright in a foreign country to be enjoyed there according to the law of the country; but to what extent or for what time does not appear. And it is stated that the assignment was of that copyright. As I conceive Bellini's right to clothe himself with the English monopoly *arose from his authorship, and not at all as
[*856] being parcel of or carved out of any foreign copyright, I do not see how an assignment stated to be of foreign copyright can pass a right under the English statutes. On the supposition, then, that the assignment maintained in this first question is intended by your Lordships to apply to the foreign copyright solely, I answer in the negative, on the ground that the assignment referred to in that question does not appear to be an assignment of any English right.

Secondly. If the assignment by Bellini had been by deed attested by two witnesses, I do not think that the defect in the title would be cured, as the assignment is stated to have been of the foreign copyright, and does not appear to have included any other right.

Thirdly. I think if Bellini had assigned either to Ricordi, or immediately to the defendant in error, by deed, similar in all respects to that executed by Ricordi, and therefore comprising and assigning the right as to this country, that the defendant in error would have had a good title to the copyright.

Fourthly. I think that if the work had been printed and published at Milan before the assignment, the right to publish in England, so as to acquire the English copyright would have been lost.

Fifthly. I think that the same consequence would have ensued if

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the publication at Milan had been made after the assignment, but before the publication in England. There would have been nothing in the assignment of the English copyright to prevent the publication at Milan, and that publication not giving the monopoly in England would, I think, make it lawful to publish the foreign work in England. And if once lawful for any one to publish, I think that the right of acquiring English copyright in the work is gone.

Sixthly. In the view which I take of the right of the author and the assignee, the limitation of the right to be exercised in this country does not appear to me to be material. It was suggested in argument that if the right was an entire right, it could not be divided, so, for instance, as to make an assignment of English copyright to one person for Yorkshire, and to another for Middlesex; and I think that in such case there would be great difficulty. In such a case as the present, however, I regard the right of the author to the English copyright as an entire thing under our municipal statutes; and as not being parcel of or derived out of anything else. I look upon the author as having this right, if at all, as the author; and not as having the copyright by the laws of Milan. And he having that entire thing under our own law, if by assignment he passes that right as to this country, there is no sub-division or limitation of the copyright, unless, indeed, the matter which has been brought under my notice to-day for the first time as to the statute 54 Geo. III., extending the privilege to all the British dominions, may make a difference in this respect.

Lastly. In answering this question I must call your Lordships' attention to the mode in which the question arises upon the record, and to the peculiar position of the parties as to the proof required by the enactment of the 5 & 6 Vict. c. 45, s. 11. The question upon this record arose upon a bill of exceptions to the ruling of the learned Judge directing a verdict for the defendant below. The section to which I refer, made the copy of the entry produced *prima facie* evidence of the title of the plaintiff. He was therefore entitled by such evidence to the verdict, unless the *prima facie* title given by the statute was destroyed by the defendant's evidence. If the supposed defect in the title *depended only upon the form or nature of the assignment produced, the plaintiff's *prima facie* title under the statute may not be so entirely destroyed as to warrant the direction to the jury that the finding must be for the defendant; as though the proof of such defective assignment without evidence of any other might be strong and cogent proof for the jury that

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there was no other; yet as it is not found that there was no other, there would be evidence both ways for the jury, and the direction to the jurors can only be supported if there was no evidence for their consideration. As to the supposed defect on the ground of the author being an alien, and not having been in this country; as that fact is directly negatived, the defect, if available, would directly negative the title of the plaintiff, and the direction of the learned Judge to find for the defendant would be right. As I think that, under the circumstances stated in the record, the title might be gained by the foreign author or his assignee, and that an assignment in writing, though without witnesses, would be sufficient; and as the assignment in question, though ambiguously stated in the bill of exceptions, may have been sufficiently general to pass to the assignee the right of clothing himself with the English copyright, (as I should suppose from the recital of it in the deed to the plaintiff it really was in point of fact), and as there is nothing, at all events, to negative the *prima facie* title of the plaintiff under the entry in this respect, by showing that there has not been a sufficient assignment by this or some other instrument, the statement upon the record not being inconsistent with the existence of a good assignment, I think that the learned Judge was not right in directing the jury to find a verdict for the defendant; and I accordingly answer your Lordships' last question in the negative.

[859] MR. JUSTICE WILLIAMS:

In answer to the question first proposed by your Lordships, I have to state my opinion, that the publication by the plaintiff in error did give to the defendant in error a right of action against him. The facts show, in my judgment, that the defendant in error, by assignment from the author, was the owner of the work in question at the time he printed and published it in this country; and that was enough, in my opinion, to give him the right of action under the statute 8 Anne, c. 19 (1). Assuming for the present that the defendant in error was the assignee of the author of the work at the time it was first published in England, before any publication of it abroad, I have to maintain the proposition that the statute of Anne conferred on him a copyright in the work, from the date of that publication, notwithstanding the author of it was a foreigner, and then resident abroad. I lay no stress on the fact that the defendant himself was a resident Englishman; because I am willing to

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concede that the proposition which governs the question, and which I am bound to sustain, in order to justify my opinion, is that a foreign author may gain an English copyright by publishing in England (before any publication abroad) though he may be resident abroad at the time. The authorities in favour of this proposition are no mean ones; though the question does not appear to have been raised till modern times. In the case of *Clementi v. Walker* (1), in the year 1824, the point actually decided was, that an author who had published first abroad gained no English copyright by a subsequent publication here; at all events, after a delay and after a publication here by another. But it is plain that neither to the counsel nor to the Judges in that cause did the doctrine ever occur, that *copyright could not be gained by a foreign author who was resident abroad at the time of the publication; and yet that doctrine would have furnished a ready and conclusive answer to one at least of the points which arose, but which was argued, and disposed of, upon other grounds in the considered and elaborate judgment of the Court. But the very question arose in the year 1835, before Lord ABINGER, Chief Baron, on the equity side of the Exchequer, in the case of *D'Almaine v. Boosey* (2), where he granted an injunction in protection of the copyright of a foreigner who had first published in England. And in the subsequent case of *Chappell v. Purday* (3), the same Judge stated that he fully adhered to his decision in *D'Almaine v. Boosey*; and he took occasion to mention that his mind had been many years before especially directed to the doctrine of copyright. Again, in *Bentley v. Foster* (4), (in the year 1839), the precise point arose before Vice-Chancellor Shadwell. In that case the author of a work from whom the plaintiff had purchased the copyright, was a citizen of the United States, domiciled and resident there: And the VICE-CHANCELLOR said that in his opinion protection was given, by the law of copyright, to a work first published in this kingdom, whether it was written abroad by a foreigner or not. And accordingly, in the year 1845, Chief Baron POLLOCK, in delivering the judgment of the Barons of the Exchequer, in *Chappell v. Purday* (5), states the result of the cases at that time decided on the subject, to be, that if a foreign author, not having published abroad, first publishes in England, he may have the benefit of the statutes. These cases were followed in 1848,

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(1) 26 R. R. 569 (2 B. & C. 861).

(4) 10 Sim. 329.

(2) 41 R. R. 273 (1 Y. & C. 288).

(5) 69 R. R. 698 (14 M. & W. 303,

(3) 4 Y. & C. 491.

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*by that of *Cocks v. Purday* (1), in which it was decided by the Court of Common Pleas, after a deliberate consideration of the authorities as well as upon principle, that an *alien amy* resident abroad, the author of a work of which he is also the first publisher in England, and which he has not made *publici juris* by a previous publication abroad, has a copyright in that work, whether it be composed in this country or abroad. And this decision was followed without comment by the Court of Queen's Bench, in *Boosey v. Davidson* (2). The only authority which in any way conflicted with these decisions, up to the time of that of *Boosey v. Purday* (hereafter to be mentioned), was a passage in the judgment of the Barons in the case I have already cited of *Chappell v. Purday*. There the point actually decided was, that a foreign author who first published his work abroad, could not gain an English copyright under the statutes. But the Court, in giving judgment, farther intimated an opinion that, on a proper construction of the Copyright Acts, a foreign author, or the assignee of a foreign author, whether a British subject or not, could not gain any English copyright. The opinion thus expressed subsequently grew so strong, that in *Boosey v. Purday* (3) the Barons declined to follow the example of the Court of Queen's Bench, in *Boosey v. Davidson*, in acceding to the decision of the Common Pleas, in *Cocks v. Purday*, and, in fact, overruled that case. The doctrine which the Barons laid down, and which has also been the foundation of the argument on behalf of the plaintiff in error, at the Bar of this House, is, that the Legislature must be considered *primâ facie* to mean to legislate for its own subjects, or those who owe obedience to its laws; and, consequently, that the Copyright Acts apply *primâ facie* to British subjects only, in some sense of that term, which would include subjects by birth or residence, being authors: and that the context or subject-matter of the statutes does not call for a different construction.

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The doctrine, then, on which the case for the plaintiff in error is rested, does not deny that a foreign author may gain an English copyright by a publication in England, provided he is resident here; and though it has not been said expressly to what period the requisite residence is to be referred, yet it seems plain that residence at the date of publication in England must be intended, because it must surely be immaterial where the author resided at the time he

(1) 5 C. B. 860.

(3) 80 R. R. 495 (4 Ex. 145).

(2) 13 Q. B. 257.

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composed the work. This doctrine cannot be adopted by your Lordships without overruling the cases of *D'Almaine v. Boosey*, and *Bentley v. Foster*, and *Cocks v. Purday*. But on the part of the plaintiff in error your Lordships are called upon, as the supreme tribunal, to disregard these authorities as inconsistent with the true construction of the statute of Anne. Now, looking merely at the words of that statute, there is nothing at all to confine the benefits of it to British subjects, by birth or residence. And although the context and the other provisions of the statute plainly show (as is fully demonstrated in the judgment of the Court of Queen's Bench in *Clementi v. Walker* (1), and in the judgment of the Court of Exchequer in *Chappell v. Purday* (2), that the publication on which the privilege is to be conferred by the statute, must be British, nothing of this kind appears as to the author being a British author.

The argument, therefore, for the plaintiff in error rests on this, viz., that the Act is styled "An Act for the Encouragement of Learning," and that its object is to encourage learned men to publish books, by conferring a *copyright on them: and that, though its language is general, yet, as the Legislature has no power but over its own subjects, natural-born or resident, it must be deemed *primâ facie* to have meant to protect those alone on whom it can impose duties. But it can hardly be said that the Act would have been improperly called "An Act for the Encouragement of Learning in Great Britain," if it had expressly provided that the publication of literary works in Great Britain, by authors or purchasers from authors, whether British subjects or not, should confer a copyright. And although no one can dispute that the British Legislature has no power to legislate for aliens, in respect of matters not occurring in Great Britain, yet it certainly has the power, and may well have the intention, to legislate for all the world, in respect of the legal consequences in Great Britain of an act done in Great Britain; and may, therefore, well enact that if an author, whether he is a subject, or in no sense a subject of the realm, writes a book, whether abroad or in this country, and gives the British public the advantage of his industry and knowledge by first publishing the work here, the author shall have copyright in this country. The argument being that foreign authors resident abroad at the time of the publication of their works in this country are to be excluded from the benefits of the Act by implication, it becomes material to inquire

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(1) 26 R. R. 569 (2 B. & C. 861).

(2) 69 R. R. 698 (14 M. & W. 303).

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whether such a construction of the general words of the Act might lead to any absurd, harsh, or unjust consequences. Lord CAMPBELL, in his judgment in the Court below, has pointed out the difficulty of supposing the Legislature to have meant that a foreign author should have no copyright if he remained at Calais, but should gain it if he crossed to Dover, and there gave directions for and awaited the publication of his work. And the same may be said of a distinction that must be *taken, if the Act is to be construed as contended for; viz., that a foreign author who during a residence in England has composed a work which is afterwards first published in England, by his order, and at his expense, shall have no capacity to acquire a copyright therein, if the exigencies of his affairs constrain him to quit England just before the work is published; but that a foreign author who, during his residence abroad, has composed a work which is afterwards first published in this country, shall have the copyright, if he happens to come to England just before the publication, and abides here till it is complete. Now, with respect to the trade of booksellers (for whose protection, as well as that of authors, the Act purports to be made) such a construction might operate with much harshness. For if a bookseller were to purchase a literary work in manuscript from a foreign author resident in England, the copyright would be lost to the bookseller, if the author should choose to leave this country and be absent from it, even without the knowledge of the bookseller, at the time of publication. And if the bookseller should think it best to publish the work in several volumes at several times (as it has happened in many well-known instances) he might have copyright in some of the volumes and not in others, because the existence or non-existence of the right would vary with the accident of the author's being or not being in this country at the dates of the respective publications of the volumes. I may add, that I think no little difficulty would arise in deciding on the rights of the bookseller, supposing the author were to die between the time of selling his work to the bookseller, and the time of the publication of the work in England.

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It remains for me to state why I think the defendant in error ought to be regarded as the assignee of the author within the meaning of the statute. I understand the *statements in your Lordships' questions to mean, that the laws of Milan recognise in the author of an unpublished book a right of property in it capable of being assigned, and that such right was duly assigned by Bellini

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to Ricordi, according to the laws of Milan, where the assignment was made; and that the assignment in England from Ricordi to the defendant was duly made according to the laws of England. If the latter assignment had comprised the whole of the right which Bellini had assigned to Ricordi, the defendant, in my opinion, would have been plainly the assignee of Bellini, the author. And I think he was not the less so within the meaning of the statute, because the assignment from Ricordi was only for publication in Great Britain. For if the author assigned the right to publish in this country, he assigned, in my judgment, a right to gain all the benefit and privileges which the statute conferred on every publication in Great Britain; and he was therefore the assignee of the author contemplated by the Act. The purchaser of a copyright from an English author would not, I conceive, be deprived of the privileges conferred by the Copyright Acts, because the assignment to him from the author was limited to publication in Great Britain; and I can see no distinction between a foreigner and an English author.

In answer to your Lordships' second and third questions, I have to state my opinion that if the assignment to Ricordi had been made by deed under the hand and seal of Bellini, attested by two witnesses, or if Bellini, instead of assigning to Ricordi, had, while living in Milan, assigned to the defendant all his copyright by deed, similar in all respects to that executed by Ricordi, that would have made no difference, provided the supposed assignments had been operative according to the laws of Milan.

In answer to your Lordships' fourth and fifth questions, I have to state my opinion that if the work had been *printed and published at Milan before the assignment to the defendant, or after the assignment to the defendant, but before any publication in this country, the defendant, by his subsequent publication in England, would have gained no copyright. The reasons for this opinion may be found fully and clearly stated in the judgment of the Court of Exchequer, delivered by Chief Baron POLLOCK, in the case of *Chappell v. Purday* (1).

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In answer to your Lordships' sixth question, I have to state my opinion, that if the assignment to the defendant had not contained any limitation as to publication in this country, that would have made no difference. I have already had occasion to give my reasons for this opinion.

(1) 69 B. R. 698, 707, 709 (14 M. & W. 303, 319, 322).

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Lastly, I am of opinion, that looking at the record as set out in the bill of exceptions, the learned Judge who tried the cause was wrong in directing the jury to find a verdict for the defendant. My reasons for this opinion have already been stated at large in my answer to the first of the questions proposed by your Lordships.

MR. JUSTICE ERLE :

To the first question of your Lordships, whether upon the facts stated the action lay? my answer is in the affirmative. This answer is founded upon the propositions—1st. That all authors have, by common law, copyright and all other rights of property in their written works. 2nd. That the statute of Anne extends to alien authors and their assigns, publishing first in England, as well as to native authors. Either of these propositions, if true, would defeat the case of the plaintiff in error; and I take them in their order.

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With respect to the property of authors in their works at common law, as the authorities conflict, I would propose to recur briefly to some first principles relating to the origin and nature of the property, then to answer some objections, *and, lastly, to review the authorities. The origin of the property is in production. As to works of imagination and reasoning, if not of memory, the author may be said to create, and, in all departments of mind, new books are the product of the labour, skill, and capital of the author. The subject of property is the order of words in the author's composition; not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined, nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation. The nature of the right of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptance, and which is the right of an author, to which the statute of Anne relates. Thus, if after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages if any are sustained; also, if the wrongful copies were published abroad, and the books were imported for sale without knowledge of the wrong, still the author's right to his composition

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would be recognised against the importer, and such sale would be stopped. These rights would be enforced for an alien as well as for a native author, in case his private writings were copied wrongfully abroad and published here, it being a personal right resting on principles common to all nations who read, and analogous to the right of an alien, while residing abroad, to prohibit the publication here of words defamatory of his character, which was recognised in *Pisani v. Lawson* (1). Again, if an author chooses to *impart his manuscript to others without general publication, he has all the rights for disposing of it incidental to personalty. He may make an assignment either absolute or qualified in any degree. He may lend, or let, or give, or sell any copy of his composition, with or without liberty to transcribe, and if with liberty of transcribing, he may fix the number of transcripts which he permits. If he prints for private circulation only, he still has the same rights, and all these rights he may pass to his assignee. About the rights of the author, before publication, at common law, all are agreed, and the cases on the point are collected in *Prince Albert v. Strange* (2). But the dispute is, whether these rights had any continuance after publication under the statute of Anne. I submit the answer should be in the affirmative, both because printing, which is only a mode of copying, and unconnected with the right of copying, has no legal effect upon that right of control over copying which existed while the work was in manuscript, and because it is just to the author and useful to the community, in order that production should continue, to secure the profits of a production to the labour, skill, and capital that produced it; and this can only be effected by giving property after publication, as the profits on books only begin then to arise.

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Those who object to the author's right at common law after publication, rely mainly on three grounds. 1st. That copyright after publication cannot be the subject of property. 2nd. That copyright is a privilege of prohibiting others from the exercise of their right of printing, and a monopoly lawful only by statute. 3rd. That by publication the property of the author is given to the public.

With respect to the first of these grounds, that copyright cannot be the subject of property, inasmuch as it is *a mental abstraction too evanescent and fleeting to be property, and as it is a claim to

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(1) 54 R. R. 738 (6 Bing. N. C. 90.) (2) 79 R. R. 307, 334 (1 Mac. & G. 25).

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ideas which cannot be identified, nor be sued for in trover or trespass, the answer is, that the claim is not to ideas, but to the order of words, and that this order has a marked identity and a permanent endurance. Not only are the words chosen by a superior mind peculiar to itself, but in ordinary life no two descriptions of the same fact will be in the same words, and no two answers to your Lordships' questions will be the same. The order of each man's words is as singular as his countenance, and although if two authors composed originally with the same order of words, each would have a property therein, still the probability of such an occurrence is less than that there should be two countenances that could not be discriminated. The permanent endurance of words is obvious, by comparing the words of ancient authors with other works of their day; the vigour of their words is unabated; the other works have mostly perished. It is true that property in the order of words is a mental abstraction, but so also are many other kinds of property; for instance, the property in a stream of water, which is not in any of the atoms of the water, but only in the flow of the stream. The right to the stream is not the less a right of property, either because it generally belongs to the riparian proprietor, or because the remedy for a violation of the right is by action on the case, instead of detinue or trover. The notion of Mr. Justice YATES that nothing is property which cannot be ear-marked and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it are also simple, but is not true in a more civilised state, when the relations of life and the interests arising therefrom are complicated. As property must precede the violation of it, so the rights must be *instituted before the remedies for the violation of them; and the seeking for the law of the right of property in the law of procedure relating to the remedies is the same mistake as supposing that the mark on the ear of an animal is the cause, instead of the consequence, of property therein. The difference in the judgments of Mr. Justice YATES and Lord MANSFIELD on this point, appears to me to be the difference between following precedent in its unimportant forms, and in the essential principles. If the precedents in their unimportant forms are to be followed, it is clear there would be no precedent relating to printing before the time of Richard I., when the common law in theory existed, as printing was not known then; and this objection has been made to copyright at common law after printing. But if

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the essential principle for one source of property be production, the mode of production is unimportant; the essential principle is applicable alike to the steam and gas appropriated in the nineteenth century, and the printing introduced in the fifteenth, and the farmers' produce of the earlier ages. The importance of the interests dependent on words advances with the advance of civilisation. If the growth of the law be traced with respect to the words that make and unmake a simple contract, and with respect to the words that are actionable or justifiable as defamation, and with respect to the words that are indictable as seditious or blasphemous, it will be thought reasonable that there should be the same growth of the law in respect of the interest connected with the investment of capital in words. In the other matters the law has been adapted to the progress of society according to justice and convenience, and by analogy it should be the same for literary works, and they would become property with all its incidents, on the most elementary principles of securing to industry its fruits, and to capital its profits.

With respect to the second objection, that copyright is a privilege of prohibiting others from the exercise of their right of printing, and so a monopoly lawful only by the statute, I submit I have already shown that copyright is a property, and not a personal privilege in the nature of a monopoly. I submit also that the notion of all printers having a right to print whatever has been published is, on the same reasoning, a mistake. The supposition of the objector is, that there is a demand for books; that the supply is produced by labour, skill, and capital, for the sake of profit; that the profit begins to arise upon the sale of the production, and that as soon as the sale has commenced the law gives to the pirate an equal right to the profits with the producer; in other words, that the law gives up the most important production of industry to spoliation; which seems inconsistent. There is no ground for the assertion that a printer is at liberty to print anything in print: to use the language of the Court in 1689, in *The Stationers' Case* (1), he may print all that has been made common, but not that which has remained inclosed. Words are free to all; he may print any words that he can compose or get composed; but it does not follow that he may transcribe the composition which another has appropriated. The printer is prohibited from words of blasphemy and sedition, for the sake of the public interest; from words of defamation,

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(1) 1 Mod. 256.

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for the sake of character; from the words in the books of the King's copyright, by reason of his property therein. The liberty of printing is restricted in these instances, and the principle of liberty would not be more infringed if the printing was restricted also as to the property of the author. Whether he is so restricted by law, is the question in controversy; and to assume that the supposed law would be contrary to lawful liberty and *therefore no law, is merely a form of assuming that the question in dispute is answered.

With respect to the third objection, that by publication the property is given to the public; if it is meant as a fact that the author intends to give it, it is contrary to the truth, for the proprietors of copyright have continuously claimed to keep it. If it is meant that the publication operates in law as a gift to the public, the question is begged, and the reasoning is in a circle. For the question being, whether the law protects copyright after publication, the reasoning in law is, that the law does not so protect it, because publication operates as a gift to the public; and the reasoning in fact is, that the publication must be taken to operate as a gift to the public, because after publication the law does not protect copyright. In further support of this view, and for a more full statement of many points here, for the sake of time, merely touched, I would beg to refer to the argument of *Wedderburn* against *Thurlow*, in *Tonson v. Collins* (1), and to the judgments of Lord MANSFIELD (2), and ASTON and WILLES, Justices, against YATES, Justice, in *Millar v. Taylor*, and to the summing up of the argument on this point in *Donaldson v. Beckett* (3), as reported in Brown's Parliamentary Cases. In all of these cases the governing question was, whether authors had a perpetuity of copyright since the statute of Anne? This House decided in the last case that the statute had restricted the right to the terms of years therein mentioned, but it left the question of copyright at common law undecided.

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With respect to the authorities, they decidedly preponderate in favour of copyright at common law. For those that are prior to Charles II., I refer, for the *sake of time, to them as cited in the cases last mentioned. They are not judicial decisions upon the right, but they are, to my mind, good evidence that the right was, from the beginning of printing, known and supported. By

(1) Sir W. Bl. 321.

(3) 2 Br. P. C. 129.

(2) 4 Burr. 2303.

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the 13 & 14 Charles II. c. 33, s. 6, the Legislature recognizes copyright as is shown more fully below; and in 16 Charles II., the Court of Common Pleas adjudged for it by deciding in *Roper v. Streater* (1), that the assignee of the executor of the author had the copyright in the law reports of the author against the law patentee, and although the law patentee succeeded on error, that was by force of his patent over law works; not from the failure of copyright as to other works. Also the statute of 8 Anne, c. 19 (2), is, to my mind, decisive that copyright existed previously thereto; and as it has been understood in an opposite sense, it may not be a waste of time to examine it with attention.

So far from creating the copyright as a new right, the statute of Anne speaks of authors who have transferred the copies of their books, and of booksellers who have purchased the copies of books in order to print and reprint the same; and if copyright in printed books was before the statute the subject of sale and purchase, it was the subject of property. It also speaks of the then usual manner for ascertaining the title to that property, for it directs that the title to the copy of books hereafter to be published shall be entered at the Stationers' Company in such manner as hath been usual. Indeed, the statute 8 Anne, c. 19, s. 1 (2), is, as to this, identical with 13 & 14 Charles II. c. 33, s. 6. Each of these statutes recognises copyright as a property existing before the statute; each secures it against piracy by penalty and confiscation; each refers to registration with the Stationers' Company as a *mode of proving the right. They differ in this, that under the statute of Charles II., the property was unlimited, and under that of Anne it is restricted to 14 and 21 years. The Legislature under Queen Anne had the double purpose of encouraging both learners and authors; and as the monied interests of these two parties conflict, the learner wishing the book at the lowest, and the author at the highest price; therefore, for the benefit of learners, the author's perpetuity in his property is reduced, as to future publications, to 14 years, with a contingent increase, and as to existing publications, to 21 years; the larger term being due for the loss of a vested right, and the price of books is to be lowered, if certain officers shall judge it to be too high. On the other hand, for the benefit of authors, the power of fining pirates and confiscating their piratical property during the statutable term

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(1) Skin. 234; referred to in 4 (2) Repealed, 5 & 6 Vict. c. 45, s. 1. Burr. 2316.

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of copyright, as also the mode of proving proprietorship, and licenses under the proprietor, by means of registration with the Stationers' Company, are restored almost as they had existed from the 13 & 14 of Charles II., till late in the reign of William III.

The Judges, in construing the 8 Anne, in *Millar v. Taylor*, advert to its Parliamentary history, as brought in to secure copyright, and altered in its progress to destroy it. But without going upon such a ground of construction, it is legitimate to observe, from the statute itself, that it appears to have proceeded from the conflicting interests of readers and authors. For the clause which has the appearance of promoting the interest of authors by vesting their property in them for a term, and giving them stringent remedies for its protection during that term, contains the expression which was ultimately discovered, after a most remarkable discussion, by the decision of this House in *Donaldson v. Beckett*, to have destroyed the perpetuity of *their property; the clause vesting the property in them for the term, "and no longer." This decision created such a sacrifice of the author's interest as I may assume has been thought inconvenient, seeing that the Legislature made one restoration to authors of their property by 54 Geo. III., and another by 5 & 6 Vict.

Furthermore, all the actions on the case, and all the injunctions for infringements of copyright, during the first fourteen years after publication, are authorities for saying that the copyright of authors at common law has continued since the statute of Anne, no otherwise affected thereby than limited in duration. For, if the statute is to be held to create a new right for fourteen years, it created also a new remedy at the same time, and that remedy, according to law, would be the only remedy. And the very narrow point on which the plaintiff succeeded in *Beckford v. Hood* (1), namely, that the new remedies given by the statute do not extend to the second term of fourteen years given to an author, in respect of which that plaintiff sued, would have been of no avail in correct reasoning for the first term of fourteen years.

In the learned conflict ending with *Donaldson v. Beckett*, the numbers for copyright at common law are in a great majority; Lord MANSFIELD, ASTON, and WILLES, Justices, against YATES, in *Millar v. Taylor*; and ten Judges against one for copyright at

(1) 4 R. R. 527 (7 T. R. 620).

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common law; and either eight Judges against three, or seven against four, for an action for infringement in *Donaldson v. Beckett*. Against copyright at common law, the sole judgment is that of YATES, Justice, of which I have before spoken; Lord KENYON seems to have held this opinion from some expressions used by him in *Beckford v. Hood*. It is true that he gives the author, by that judgment, the remedy given by *the law in respect of a right at common law, but he derives the right from the statute of Anne; and thereby the judgment is, I submit, anomalous. Lord ELLENBOROUGH also seems to have held this opinion, from some incidental expression in *The Cambridge University v. Bryer* (1). But the latest judgment on the point is that of Lord MANSFIELD, in *Millar v. Taylor*, in which he does the service of tracing the law upon the question to its source in the just and useful. And Lord MANSFIELD's authority in this matter outweighs that of Lords KENYON and ELLENBOROUGH, not only as an elaborate judgment outweighs an extra-judicial expression, but also because these successors of Lord MANSFIELD appear to me to have turned away from that source of the law to which he habitually resorted with endless benefit to his country.

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It is true that no record of an action on the case for infringement of copyright, prior to the statute of Anne, has been found; the claim in *Roper v. Streater*, though founded on copyright, being in form for a penalty under the Licensing Act. But, the absence of resort to that remedy is no presumption against the right to it, if no such remedy was needed, or if more convenient remedies existed. And there is reason for believing that this was the case; for printing, when first introduced, was regulated by the Legislature, and confined in its progress by the powers of the Star Chamber and High Commission Courts, and by Licensing Acts, and patents for the sole printing of certain works. And so late as the 13 & 14 Charles II. c. 33, s. 11, the number of printers is restricted by that statute to twenty, and of type founders to four; and proprietors of copyright then registered with the Stationers' Company, and came under their regulations. And thus the opportunities for piracy were rare, while *presses were few and known, and consequently the need of an action on the case against a pirate would be small.

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Furthermore, if there were pirates, the remedies in the Star Chamber, and for penalties under the statutes, were probably more convenient than actions for damages; indeed, it is noticed by

(1) 16 East, 317.

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WILLES, Justice, in *Millar v. Taylor*, that, in the time of Queen Anne, the poverty of those who practised piracy was such as to make an action for damages against them futile, and that therefore the booksellers petitioned for the statute of 8 Anne to enable them to punish piracy by penalty and confiscation. In such a state of society and of the law, the absence of an action on the case is of no weight in the way of presumption against the right.

Upon this review of principle and authority, I submit that authors have a property in their works by common law, as well since the statute of Anne as before it; that such property includes copyright after publication; that before publication abroad, the property of an alien author in his work is recognised in our law; that this property of an alien author passed to the plaintiff below, and was infringed by the defendant below; and that therefore the action lay.

But supposing your Lordships should be of opinion that since the statute of Anne the right of an author to copyright after publication is derived from that statute alone, still I submit that the plaintiff below had cause of action. The plaintiff in error contends that the statute put an end to the property of the author existing at publication, and created a personal privilege in the nature of a monopoly; and that because the Legislature intended to encourage learning, and to induce learned men to write useful books, that therefore it excluded alien authors from the privilege so created. As to the statute putting an *end to the property of the author, and creating a personal privilege, what I have before stated contains the grounds of my opinion to the contrary. It is clear that the author had and has property before publication: *Prince Albert v. Strange* (1); the statute does not express an intention to annul or destroy property, and effect can be given to all its provisions without coming to that conclusion.

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As to the right of prohibiting piracy being a personal privilege of monopoly, the answer is, that it is the same right as is incidental to all ownership, which in its nature prohibits the use of the property against the will of the owner, and is no more a monopoly in case of copyright than in the case of other possessions. Even if the statute should be held to annul the property after publication, still it leaves the property before publication as it was; and then the right of the plaintiff below stands, for he took by assignment, before publication, when the statute had no operation. As to the

(1) 79 R. R. 307, 334 (1 Mac. & G. 25).

intention of the Legislature to exclude alien authors from the rights of authors in England, because it is intended to encourage learning, and to induce learned men to write useful books, the recited intention leads me to an opposite construction; for learning is encouraged by supplying the best information at the cheapest rate, and according to this view the learner should have free access to the advances in literature and science to be found in the useful books of learned men of foreign nations, and I gather from the statute that this was its scope. It is not to be supposed that the Legislature looked upon all foreign literature as bad, because of some pernicious writings, or on all British productions as good, on account of some works of excellence; nor is it to be supposed that the Legislature planned either to release British authors from a competition with aliens, or to *restrict readers to a commodity of British productions of inferior quality, at a higher price; or that it intended to give to British authors of mediocrity a small premium, at the expense of depriving British printers and booksellers of the profit of printing and selling works of excellence by aliens. If any such plan existed, the enactment contains no words for executing it. It provides for authors, which, in common acceptation, denotes authors of all countries; "author" expressing a relation to a work exclusive of country. The notion that "authors" here meant authors in some sense British, first emanated from the Court of Exchequer, in *Chappell v. Purday*, as a ground of judgment; and although years have since elapsed, I do not find that any one can express with the precision required for practice, in what sense the authors must be British. Perhaps Irish authors were not excluded; but if "authors" means British authors, by what construction were the Irish included? Perhaps alien authors, who owed British allegiance by reason of residence in Britain, are included; but if so, what is the residence that will qualify? Must it be during education, so that the mind should be British; or during composition, so that the work should be British? I believe that the answer to both is in the negative, the rule in this sense being too vague to be practical, and that the qualification is to depend upon the moment of publication or assignment. If the alien has come across the frontier at that moment, he is to be British within the statute. By such a construction the Legislature would be taken to have planned a British monopoly, and made it liable to be defeated by any alien, who would go through a senseless formality; which seems inconsistent. Moreover the construction is too vague for

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practice, not only as to the authors within it, but also as to the books to be affected thereby. If ancient manuscripts are brought to *light from unburied cities, or private papers, written by foreigners remarkable in history, are purchased and published by the skill and capital of a British bookseller, in neither case is the author British; but it is not to be supposed that Parliament would for that reason intend to deny security to such an investment, and to lay the profits of such a bookseller at the mercy of any pirate who would re-print; if it is said that the transcriber of a difficult manuscript is equal in merit with an author, is not such a notion devoid of practical precision? and if it is adopted, would the bookseller lose his investment, if he employed an alien to transcribe? Again, if it is said that the collector of letters and papers of a distinguished foreigner might publish with notes and narrative, and so be protected, is not the protection illusory if the pirate might transcribe the original documents, and supply his own notes and narrative?

These considerations lead me to the conclusion that the construction proposed by the plaintiff in error is wrong. It is contrary to the general rule, requiring effect to be given to words according to their ordinary acceptance; it is contrary to justice and expediency, in depriving learners of information, and booksellers of their profits, while the supposed protection of British authors from competition is of more degradation than gain to them.

In holding that the plaintiff below may maintain his action on copyright derived under the statute of Anne, no extra-territorial effect is given to that statute. The personal right of the alien author, at Milan, to the copyright in his manuscript, which is assumed in the question, is recognised in England, on the authorities collected in *Cocks v. Purday* (1); the manuscript is assigned in Milan by the author, and brought to England, without having *been published abroad by the assignee, and he assigns to the plaintiff before publication, and so before the term of copyright, supposed to be given by the statutes, begins. Afterwards the plaintiff, being such assignee, publishes in England, and after publication in England, claims the operation of the statute in England, to protect his right there; and in so doing, he claims only an intra-territorial effect from the statute. Nay, if the statute made void the assignment in Milan, which was valid by the law of that place, it would have an extra-territorial effect, by depriving an

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(1) 5 C. B. 860.

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alien abroad of a personal right in England, which, but for the statute, the common law would have given him there. I rely on these reasons, in addition to the reasoning in the judgment appealed from, to show that the plaintiff in error is wrong in his construction of the statute of Anne, and that the plaintiff below had cause of action under that statute.

To the second question, whether, if the assignment from Bellini had been by deed, attested by two witnesses, it would have made any difference, I answer in the negative. In my opinion it is immaterial; the assignment by a foreigner abroad having validity in England, if in the form required by the law of the country where it is made. Even if the English law operated in respect of the assignment of copyright at Milan, since the 54 Geo. III. c. 156, s. 4, that is since 1814, the requirement of two witnesses to a licence, according to the statute of Anne, has ceased, and an unattested licence in writing is sufficient, and therefore an unattested assignment in writing is valid. As the 54 Geo. III. c. 156, s. 4, has altered the law on this point, it is not of much importance now to consider whether the requirement, in the statute of Anne, of two witnesses to a licence, after publication, to be used by a defendant charged with piracy, was a requirement of two witnesses to an *assignment before publication, to be used by a plaintiff in an action on the case for damages, as laid down in *Power v. Walker* (1). The statute does require the defence of licence to be so proved; and that in the case of a plaintiff claiming under a licence, and suing for a statutable penalty, the licence should be so proved; but it appears to leave the assignee, suing according to the common law, to prove his case under that law. Still it may not be immaterial to observe upon the decision in *Davidson v. Bohn* (2), by which, since the 54 Geo. III., an assignment was held void, which had one witness only, that the difference between the statute of 8 Anne, and the statute of the 54 Geo. III., was not adverted to therein.

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To the third question, my answer is in the negative. It would have been immaterial. The assignment in the form valid at Milan, would, in my judgment, be valid in England; so would also an assignment in the form valid in England, if made to an Englishman, to be used in England.

To the fourth question, whether a publication in Milan, before the assignment to plaintiff below, would have made any difference, my

(1) 15 R. R. 378 (3 M. & S. 7).

(2) 6 C. B. 456.

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answer is in the affirmative. It would have defeated the right of the plaintiff below. I understand the cases to have decided that there is no copyright in England for a work which has been already published abroad. It seems that the Legislature recognized this to be the law by 8 Anne, c. 19, s. 7, relating to the importation of books printed abroad, and by the statutes on international copyright.

To the fifth question, my answer is the same as to the fourth; the lawful publication abroad would defeat a claim of copyright in England.

[*883] To the sixth question, whether, if the assignment to the plaintiff below had not contained a limitation to this *country, it would have made any difference, my answer is in the negative; it would be immaterial, for the reasons given in my answer to the first question. The owner of copyright may dispose of the whole, or any part of his interest, as he may choose.

To the last question, whether the Judge was right in directing a verdict for the defendant, my answer is in the negative, the plaintiff having been, in my judgment, entitled thereto, on the grounds before stated.

MR. JUSTICE WIGHTMAN:

It appears, from the statement of facts which precedes the questions proposed by your Lordships, that Boosey, the defendant in error (a British subject residing in England), was the first publisher of a certain literary work, and that such first publication was in England; but that he was not himself the author of the work, nor the immediate assignee of the author, who was an alien, residing at Milan, and who there assigned, by an unattested written instrument, what is called his copyright in the work, to one Ricordi, who assigned the same in England, by deed attested by two witnesses, to Boosey, the defendant in error, but for publication in the United Kingdom only.

The first question proposed by your Lordships is, did Jefferys, by printing and publishing the same work in England, subsequently to the printing and publishing by Boosey, give to the latter any right of action against him? The answer to this question depends upon the construction to be put upon the statute of 8 Anne, c. 19(1); but it may be expedient to consider the nature of the property, and of the right of an author in what may be called "the copy" of his

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works, as recognised by the common law, independently of the statute. It appears by the answers of the Judges to the questions proposed to them by the House of *Lords, in the case of *Donaldson v. Beckett* (1), that ten out of eleven Judges were of opinion that, by the common law, an author of any literary composition had the sole right of first printing and publishing the same for sale, and eight out of the eleven were of opinion that he might bring an action against any one who published the same against his consent; seven of the eleven were of opinion that the author did not lose his right upon his publishing the work; and six of the eleven Judges were of opinion that whatever right of action the author might have had by the common law, after publication, it was taken away by the statute of Queen Anne. The only point upon which the Judges were almost unanimous (ten to one) was, that by the common law, the author of a literary work had the sole right of first printing and publishing the same for sale. Upon the mode of enforcing the right, and the extent of it, after the first publication by the author, there was much greater difference of opinion, and the majority came to the conclusion that, after publication, the right and the remedy for any infringement were regulated by the statute. It would appear then, from the opinions given by ten of the eleven Judges, to whom may be added Lord MANSFIELD, that by the common law the author of a literary composition is entitled to "the copy" of it. The term "copy" is said by Lord MANSFIELD, in the case of *Millar v. Taylor* (2), to have been used for ages in a technical sense to signify "an incorporeal right to the sole printing and publishing of something intellectual communicated by letters." This incorporeal right or property the author has at common law, according to the opinion of those learned persons, from the time of composition down at least to the time of first publication; and by the statute of 8 Anne, c. 19, from the time of first publication for the time specified in *that and the subsequent statute of 54 Geo. III. c. 156 (3). This incorporeal right or property may be possessed by any one who may acquire or hold personal property in England, as far as the right of property depends upon the common law. The right or property is merely personal, and an alien friend, by the common law, has as much capacity to acquire, possess, and enjoy such personal right or property as a natural-born British subject.

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(1) 4 Burr. 2408; 2 Br. P. C. 129.
(2) 4 Burr. 2303.

(3) Repealed, 5 & 6 Vict. c. 45, s. 1.

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An alien friend may possess any description of personal property in England, and maintain any action in respect of it applicable to the nature of the wrong. He may have a property in its nature incorporeal in his character and reputation, and may maintain an action for verbal or written slander. In *Tuerloote v. Morrison* (1), the plaintiff brought an action against the defendant for verbal slander, and the defendant pleaded that the plaintiff was an alien at the time of speaking the words, born at Courtrai, in Brabant, out of the King's allegiance, upon which the plaintiff demurred, and had judgment in his favour, the Court saying, that the protection of the common law extended both to the goods and to the person of an alien friend. This appears to have been the first instance of such an action; but in the more modern case of *Pisani v. Lawson* (2), an action for libel was held to be maintainable by an alien, though resident abroad, in accordance with an *Anonymous* case reported in Dyer (3), in which it was held that an alien residing abroad might maintain an action of debt in the English Courts.

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It is hardly disputed in the present case, that if Bellini, the author, an alien friend, had come to England, and there, for the first time, published his work, he would have been entitled to copyright, and to the protection afforded to *authors by the statute of Anne, or if, being in England, he had duly assigned his copy to Boosey, who had published the work for the first time, the latter would have been entitled to copyright and the protection of the statute. The question turns upon the circumstance of Bellini being an alien resident in Milan at the time of the assignment by him and of the publication of the work in England. It was said for the plaintiff in error, that Boosey, at the time of publication in England, could have no greater right than the author himself would have had, supposing he had published it on his own account whilst residing at Milan, and that the author, unless he was in England at the time of publication by him there, could acquire no English copyright, as it was called, as all that he was possessed of whilst resident at Milan was what was called a Milanese copyright, and that when he assigned to Ricordi, he assigned no right in England, but only a right in Milan. It is proper that I should now advert to the statute of the 8 Anne, c. 19 (4). (His Lordship stated the title, the preamble, and the first section of the

(1) 1 Bulstr. 134; Yelv. 198.

(2) 54 R. B. 738 (6 Bing. N. C. 90).

(3) Dyer, 2 b.

(4) Repealed, 5 & 6 Vict. c. 45, s. 1.

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statute.) The statute gives the author or his assignee copyright, properly so called, from the time of the first publication in England. From the expressions used in it there is a recognition of proprietors of literary works, independently of the statute, and it enables the author to give to an assignee the same power to obtain a copyright that he possessed himself; but neither he nor his assignee would be entitled to copyright until publication. Whatever right the author may have possessed before publication must have been at common law. The statute is general in its terms as to the persons who may be entitled to the benefit of it, and has no words or expressions to show that it was intended for the exclusive benefit of authors who are British subjects. It professes to be an Act for the encouragement of learning *generally, and for the encouragement of learned men to compose and write useful books, without reference to any country or persons. Literature and learned men are of no particular age or country, and the benefit to be derived by this country from the encouragement of learned men would be greatly reduced if the operation of the statute was restricted to native authors. It seems, indeed, to be admitted, that if a foreign author comes to England for however short a time, and first publishes his work here, he is entitled to the benefit of the statute; but if he stopped at Calais, and sent his work to London by an agent to be published for him, he would not be entitled; or if he assigned his copy at Calais, he would transfer no right or property to his assignee, though he would if he assigned at Dover. It is said, and said correctly, that the English municipal law has no operation *extra fines*, but the question in the present case arises with respect to a matter occurring within the realm, namely, the first publication in England of a work by a foreign author which had not been published elsewhere before. Neither the common law nor the statute of Anne excludes the right of a foreign author to possess such a property in England, though he may be resident abroad, and to maintain a personal action, if such personal right or property, though incorporeal, is infringed, and if Bellini himself had been the publisher, though resident abroad, I am not aware of any good reason why he would not have been entitled to all the rights that an English author would have been entitled to, and the principles deducible from the authorities I have already referred to fully warrant such a conclusion. But it is said, that even if Bellini could, by publication himself, and on his own account, in England, though he was at the time resident at Milan, become entitled to

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copyright and the protection of the statute, he could not by an assignment at *Milan give any title to copyright in England to an assignee, for that he had nothing to assign before publication in England but what is called a Milanese copyright.

If the opinions of the ten Judges in the case of *Donaldson v. Beckett* and others be correct, Bellini would be possessed, as author, of an incorporeal right or property in his unpublished work, recognized by the law of England. It is true his right would not come into question until it was to be claimed or exercised in England, but his right and property would nevertheless exist. That which Bellini had at Milan, was "the copy," or right of publication of his work, a species of personal property incorporeal, which, as it seems, the common law of England considers every author entitled to, and which, when carried into effect by actual publication in England by the author or his assignee, would entitle either to the benefit and protection of the statute of Queen Anne. The property which Bellini had in "the copy" of his work he assigned at Milan to Ricordi, and being a personal matter, the assignment would transfer the property, so as to give the assignee the same right that the assignor had, in all countries where such property is recognised, and in which it may be transferred by assignment, as it may in this case, both by the law of Milan and the law of England. The law of Milan will not confer any right upon an author in this country, nor will the law of England confer any right at Milan, or have any ex-territorial power. But the question here is whether a certain subject-matter is property assignable by the English law, though its first existence may have been abroad.

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In all, or almost all the cases that have occurred upon the subject of copyright, it has been made a question whether, before publication, there could be any property in an author in his composition. There has been no *decision, of which I am aware, that there may not be such property, and if there is, as would appear to be the case from the opinions to which I have referred, it would be subject to the ordinary incidents to such property. In the case of *Tonson v. Collins* (1), which was an action on the case for pirating the *Spectator*, it was said, *arguendo*, that that part of the special verdict which stated that the author, Mr. Addison, was a natural-born subject, was of no consequence, because the right of property, if it existed, was personal, and might be acquired by aliens. That case was by five or six years prior in date to the case

(1) 1 Sir W. Bl. 321.

of *Donaldson v. Beckett*, to which I have already referred, and there was no decision upon it.

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In the case of *Clementi v. Walker* (1), the question now under consideration did not arise, nor does the decision in that case at all govern the present.

The first case of which I am aware in which the question came directly before a court of common law, and in which there was an express decision upon the point now under consideration, was the case of *Chappell v. Purday* (2). In that case it was intimated by the Court of Exchequer, that a foreign author residing abroad, who composed and published his work abroad, had not, either at common law or by the statutes of 8 Anne, c. 19 (3), or 54 Geo. III. c. 156 (3), any copyright in this country. The LORD CHIEF BARON, in giving judgment in that case, says, "We think it doubtful whether a foreigner not resident here can have an English copyright at all, and we think he certainly cannot, if he has first published his work abroad, before any publication in England." That latter circumstance of the first publication being abroad, distinguishes that case from the present, and leaves the question of the right *of a non-resident foreigner who first publishes in England doubtful.

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In the previous case of *D'Almaine v. Boosey* (4), decided by Lord ABINGER in the Exchequer in Equity, he observes, "The Acts give no protection to foreign residents abroad in respect of works published abroad." I may here remark, that in the case of *Chappell v. Purday*, the LORD CHIEF BARON, after reviewing the previous decisions, says, "The result seems to be, that if a foreign author, not having published abroad, first publishes in England, he may have the benefit of the statutes."

In the case of *Cocks v. Purday* (5), the express point now under consideration arose, and the Court of Common Pleas held that a foreigner resident abroad may acquire copyright in this country in a work that is first published by him as author, or as author's assignee, in this country, which has not been made *publici juris* by a previous publication elsewhere.

The same question came before the Court of Queen's Bench in the case of *Boosey v. Davidson* (6), and it was held by that Court that a foreigner, though resident abroad, may have copyright in this country, if the first publication is in this country. The circumstances in that case were the same as in the present.

(1) 26 R. R. 569 (2 B. & C. 861).

(4) 41 R. R. 273 (1 Y. & C. 288).

(2) 69 R. R. 698 (14 M. & W. 303).

(5) 5 C. B. 860.

(3) Repealed, 5 & 6 Vict. c. 45, s. 1.

(6) 13 Q. B. 257.

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The next case was that of *Boosey v. Purday* (1), in which the question was the same as in the present, and in which the Court of Exchequer held that a foreign author residing abroad, who composes a work abroad, and sends it to this country, where it is first published under his authority, acquires no copyright therein; neither does a British subject, who claims under an assignment made abroad by the author, gain any such right.

[891] In the case of *Ollendorf v. Black* (2), Vice-Chancellor KNIGHT BRUCE was of opinion that a foreign author, who first published in England, did acquire a copyright.

Upon modern authority, then, there appears to be a preponderance in favour of the proposition that a foreign author, resident abroad, can by first publication in England acquire a copyright here; but I am also of opinion that, upon the principles deducible from the older authorities, and upon the true construction of the statute of the 8 Anne, he may acquire such a right. With respect to the assignment to Ricordi, there is nothing in the terms used in the statute of Anne which requires the assignment to be either by deed or attested by witnesses; and at all events, since the statute of 54 Geo. III. c. 156, it appears to me that an assignment by writing only is valid; and by the law of Milan, where it was made, it is said to be sufficient to pass such property. I therefore think that the defendant in error (Boosey), had a right of action against Jefferys.

With respect to the second and third questions proposed by your Lordships, it appears to me that it would not have made any substantial difference in the case if the assignment to Ricordi had been by deed attested, or if the assignment had been direct at Milan from Bellini to Boosey, by deed attested. My reasons are included in those which I have presented to your Lordships in answer to the first question; and though by the English law an assignment of a copyright should be by writing, neither the law of England nor of Milan requires that it should be by deed, or attested.

[*892] With respect to the fourth and fifth questions proposed by your Lordships, it appears to me that, if the work had been printed and published at Milan before the assignment *to Boosey, or after the assignment to him, but before publication here, neither the author nor his assignee would have been entitled to copyright in England. It appears to me that first publication in England is essential to entitle the author or his assigns to the protection given by the statute.

(1) 80 R. R. 495 (4 Ex. 145).

(2) 87 R. R. 353 (4 De G. & Sm. 209;
20 L. J. Ch. 165).

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In this view of the case, my opinion is supported by the judgment of the Court of Exchequer in the case of *Chappell v. Purday*. I may observe, that a first publication at Milan by the author after assignment would not be by a wrong-doer as far as Boosey is concerned, as the assignment to him is limited to publication in England.

With respect to the sixth question, it appears to me that the limitation in the assignment makes no difference, under the circumstances of the case. A first publication in England under such an assignment would, I think, entitle the assignee to the benefit of the statute; for no terms, however general, could restrain a publication abroad, where the English law has no operation; and I am not aware of any rule of law which would make such a restricted assignment invalid, though it may be that, as far as copyright in the British dominions is concerned, a restricted assignment would exhaust the whole power of the assignor, and that he could not make another assignment to take effect in another place.

Upon the last question proposed, I am of opinion that, looking to the record as set out, the learned Judge who tried the cause was wrong in directing the jury to find a verdict for the defendant.

MR. JUSTICE MAULE :

Before answering the several questions put to the Judges, I propose to begin by stating some of the principles on which I think the solution of those questions depends.

In so doing, the nature of copyright itself is first to be considered. In the sense in which copyright is commonly spoken of, it comprehends, first, the right belonging to an author before publication, that is, the right to publish or not, as he thinks fit, and to restrain others from publishing; and, secondly, the right, after publication, of republishing, and of restraining others from doing so.

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The first kind of copyright (that of the author before publication), has been much less questioned than the right after publication; and indeed there are reasons for the right before publication; which do not apply to the right after publication; as well as reasons against the right after publication, which do not apply to that before publication.

With respect to the right before publication, as above described, I am of opinion that such right does in fact exist by the common law of England. The weight of authority is in its favour; it has scarcely been disputed, and it appears to me to arise out of the nature of the thing, and to be like the law of the exclusive right of

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property in personal chattels, arising out of their nature in respect of their mode of acquisition, and their capacity of exclusive use; and that, therefore, like the law enabling private persons to hold property in personal chattels, it is to be presumed to be the law of all civilized countries, so far as not derogated from by the municipal law of any particular country. It therefore appears to me that the law giving to the author the extent of copyright applicable to the case of an unpublished work, must be taken not only to be part of the common law of England, but also to be the law of all countries where it is not shown to be restricted by the law of the place, and therefore that it must be taken to be the law of Milan.

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The second kind of copyright, that which restrains all but the owner of the copyright from republishing a book *already published, certainly does not arise, like the first kind of copyright, out of the nature of the thing. It is rather in derogation of the natural right of an owner of a copy of a published book to make what use he will of his own property, by copying it or otherwise. Whether such a copyright does actually exist by the common law of England has been much questioned, and high authority may be cited on both sides. But it is not necessary for my present purpose that I should decide this question, except so far as to say that I am of opinion that no such right exists in respect of the first publication in England, of a book which had been previously published in a foreign country. The existence of such a law is not supported by authority, and, if it existed, it would take away the right of an owner of a copy of a work, so published, to re-publish it in England; a right which he clearly had before the first publication here. It is indeed conceivable that such a law might exist, and that its object might be to encourage and reward the republication in this country of good books already published abroad. But it is very unlikely that such a law, if it existed, would give, without any distinction, the same monopoly to a republisher of a book which any one might and could republish, as to an author of an unpublished work; I think it, therefore, very clear that the common law does not confer any copyright on the first publisher in England of a book already published abroad, the right to publish such a work having thereby become common to all. But whatever may be the common law, there is no doubt that a right after a first publication in this country, and indeed arising out of that first publication as well as dating from it, is conferred by the statutes of 8 Anne, c. 19 (1),

and 54 Geo. III. c. 156 (1), and the existence of this right is sufficient to enable me to answer the questions proposed.

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A main question debated at the Bar, and often agitated elsewhere, was, whether the statutes of Anne and Geo. III., do, on their true construction, give the sole liberty conferred by them on authors and their assigns to authors and their assigns who are aliens, and it appears to me that they certainly do. By the common law of England, aliens are capable of holding all sorts of personal property, and exercising all sorts of personal rights. Their disabilities in respect of real property arise out of special laws and considerations applicable to property of that particular kind. So that when personal rights are conferred, and persons filling any character of which foreigners are capable are mentioned, foreigners must be comprehended, unless there is something in the context to exclude them. The general rule is, that words in an Act of Parliament, and indeed in every other instrument, must be construed in their ordinary sense, unless there is something to show plainly that they cannot have been used, and so, in fact, were not used, in that sense. Here the words to be construed are, "author, assignee, and assigns." These words plainly comprehend aliens as well as others; and there is nothing, as it seems to me, in any part of the Acts to show that they are to be restricted. Indeed, those who reject this construction, do not rely on anything to be found in the terms of the Acts; nor is it pretended that, by construing the words in their proper sense, any contradiction, incongruity, or absurdity will arise. But it is said that the intention of the Acts is restricted to the encouragement of British industry and talent, and that this construction of the words would give an effect to the Act beyond that restricted intention, *Chappell v. Purday* (2). I cannot bring myself to think that any such restriction was intended; it certainly is not expressed. But even *taking the intention of the Acts to be as assumed, it would not, I think, be sufficient to take from the general words of the Legislature their natural and large construction; for British industry and talent will be encouraged by conferring a copyright on a foreigner first publishing in England; industry, by giving it occupation; and talent, by furnishing it with valuable information and means for cultivation. It is also said that the Legislature was dealing with British interests, and legislating for British people. This is true; but to give a copyright to a foreign author publishing in this country is dealing with

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(1) Repealed, 5 & 6 Vict. c. 45, s. 1. (2) 69 R. R. 698 (14 M. & W. 303).

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British interests, and legislating for British people. Some parts of the Acts, it is said, though expressed generally, must be construed with a restriction to this country. And this is true with respect to the extent of the sole liberty of printing conferred by the Acts in general terms. But these words are, with respect to their operation, necessarily confined to the dominions within which the Legislature had the power of conferring such liberty; and the words prohibiting importation show that the framers of the Acts had this construction distinctly in view. But this consideration has no operation with respect to the persons on whom the sole liberty is conferred. The words, "author, assignee, and assigns," naturally comprehend aliens; and the Legislature is not denied to have had the right and power of conferring the sole liberty on them if it thought fit. In my opinion, therefore, the Acts confer a copyright on a foreign author, or his assignee, first publishing in England. To hold otherwise would, I think, be contrary to the plain meaning of the Acts, and would be a most inconvenient restriction of the rule, which, in personal matters, places an alien in the same situation as a natural-born subject.

[*897] Having stated the principles on which I think the *several questions put to the Judges may be determined, I proceed to answer them severally.

As to the first, it appears to me that Bellini was an author within the meaning of the Acts of Anne and Geo. III.; that the copyright which he is said to have had, is to be taken to have comprehended the copyright before publication, as above explained; that by the transfer of that right, which is stated to be valid by the laws of the country where it was made, Ricordi became an assignee of the author within the meaning of the Acts, and acquired under them, as incident to that character, the right of obtaining to himself or his assignees, by a first publication in this country, the sole liberty of printing conferred by the Acts upon an author and his assignee; and that Ricordi duly assigned that right to the defendant. The words limiting that assignment to publication in the United Kingdom do not operate, I think, as restrictive of the rights acquired by the defendant Boosey to become entitled, under the Acts, to a sole liberty of printing and publishing in this country, by publishing here before any publication elsewhere; and I think this assignment, notwithstanding such limitation, constituted the defendant a complete assignee of all the right of publishing recognised and conferred by the statutes, that is the right of publishing

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in the United Kingdom, as effectually as it would have done if the limiting words had been omitted. Words not so limited would have given no greater British right, and I think it makes no difference with respect to that effect, that perhaps such words might have conferred some rights in other countries, which perhaps Ricordi may have had. I therefore answer the first question, that the publication by the plaintiff in error did give the defendant in error a right of action against the plaintiff.

As to the second question, I think it would have made *no difference, supposing the other circumstances in the first question to be the same.

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Thirdly,—I think it would have made no difference. This question does not state that such a deed would have been operative by the laws of Milan; but as the subject of it was expressed to be, and actually was the right of publishing, or that of acquiring such right by proper means in the United Kingdom only, and as the deed was in a form, which by the law in this country was proper to operate on such a subject, and was executed by an “author,” on whom the Acts conferred the British right and the power of transferring it, I think such deed was effectual for the purpose of constituting an assignee within the Acts.

Fourthly and fifthly,—In the cases supposed in these two questions, I think the defendant in error would have had no right of action against the plaintiff in error. The copyright in printed books, given by the Acts of Anne and Geo. III., is given to the authors and their assigns, of books not printed or published. This, I think, means not printed or published generally, or anywhere. The words naturally bear this meaning; and there is nothing, I think, to restrict it. When a book has once been published, the right to republish it seems to be common to all, except so far as the law of any place may specially restrain it. At the time of the defendant's publication in the cases supposed in these questions, he was not the author, or assignee of the author, of a book not printed and published, and on such only is the sole liberty conferred by the statutes, and I have already shown that no such right exists at common law with respect to a book previously published in a foreign country.

Sixthly,—I think, for the reasons stated in answer to the first question, that whether the words limiting the right to the United Kingdom were or were not contained in the *assignment, the defendant in the case supposed in the first question would have had a right of action against the plaintiff.

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Lastly,—It appears to me that, for the reasons above given, the learned Judge was not right in directing a verdict for the defendant.

MR. JUSTICE COLERIDGE :

In answer to your Lordships' first question, I am of opinion that the publication therein stated gave to the defendant in error a right of action against the plaintiff in error, and this question in substance is one of so long standing, and has been so often discussed with so much learning, and such great ability, that I despair of adding anything new in support of my opinion. Therefore, although your Lordships will expect me to state my reasons for entertaining it, I shall endeavour to do so as shortly as I can, and without any complete or detailed collection of the conflicting authorities.

First, however, it is necessary to settle the state of facts on which I found myself. The question appears to me to identify, for the purposes of the argument, Bellini and Ricordi. The former is said to have "a certain copyright," which copyright he effectually vested in the latter. If by the words "certain copyright" your Lordships had intended to speak of a copyright with any limitations specified in the contract material to the present argument, I must presume they would have been stated; I consider, therefore, that none is to be supposed to have existed. On any other supposition the question cannot be answered at all, because we do not know its terms; and further than this, as your Lordships, addressing English Judges, use the term "copyright" without any definition, I must assume that, although speaking of a Milanese author in Milan, *and a Milanese production, your Lordships use "copyright" in the sense in which an English Judge would define it, according to English law, to an English jury. And still further, although the question states Bellini to have been an alien friend, and is silent as to Ricordi, I suppose I must, in order to raise the question at all, assume that Ricordi is to be considered an alien friend also. Ricordi, then, came to this country, bringing with him an unpublished manuscript of a literary work, of which he was the lawful owner, and owner also of the copyright, so far as the original author could confer it on him. The manuscript, namely, the paper with the writing on it, was a personal chattel. The unrestrained copyright, or copy, to use the technical term, is well defined by Lord MANSFIELD in *Millar v. Taylor* (1), as "the incorporeal right

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to the sole printing and publishing.” These are manifestly two distinct properties, capable of distinct violations, protected by distinct sanctions and remedies, but both such in their nature as an alien friend may by our law possess, and entitling him to the enjoyment and use of all such sanctions and remedies, in case of violation, as a natural-born subject would have. It seems to me, therefore, that he stood in the same situation as a natural-born subject would have been in if he had composed a literary work in Milan, and brought it with him unpublished to England.

Two considerations, however, are suggested as difficulties at this stage of the argument, the first arising from the nature of the thing itself, the right of copy; that which the French jurists call the “object” of the right, and the second from the quality of the person, or what they call the “active subject” of the right. It is said that from the nature of the thing, the property being the creation of positive law, and both Bellini and Ricordi owing their *right of property entirely to the law of Milan, which could have no operation in England, Ricordi bringing the manuscript with him here, brought no right of property attached to it. Secondly, it is said that there is a difference between a natural-born subject and an *alien amy* in England; because it has been decided that a prior publication abroad prevents the latter from having any copyright in England, whereas it has not that effect in regard to a natural-born subject.

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I will consider in what follows both these objections. It would certainly be a miserable reflection on our municipal law, whether common or statute, both in respect of its consistency and breadth, if the first objection could be maintained. It cannot be denied, that the alien arriving with the manuscript in his portmanteau, if it were stolen from him, might have recourse to the criminal law of the country, and that if it were stolen from the possession of another person to whom he had lent it, he might, in the indictment, still describe himself as the owner of the property. It is not denied, that if it were taken from him in any way other than feloniously, he might sue for it, or its value, in detinue or trover. But this value, it is said, is merely that of the paper and ink, and that it is immaterial whether the writing on it be a collection of nonsense verses, or the most excellent product of human intellect; because, although he has the undoubted right and power to prevent any one from seeing, reading, or multiplying copies of it, yet, if this last be done unlawfully, because he has no right to multiply copies himself

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exclusively, he is not injured by the act of multiplication by another, and therefore is not entitled to any compensation. I do not wish to wander unnecessarily into equitable considerations, yet I may observe, in passing, that I presume that if the *alien amy* had corresponded from abroad with an Englishman here, and that Englishman should attempt to publish *the letters against his will, he, being in England, might restrain him by injunction, on the ground of his property, and might have an account against him for the profits of the publication, if he published them, on the same ground. And this seems to me very material to the present inquiry. I confess to the strongest disinclination to the belief that our law is so inconsistent and narrow. But, before I come to the inquiry directly into this, let me observe, that it seems to me a fallacy to found Ricordi's rights, in England, upon any supposed operation of the Milanese law here, and that the whole argument on the intra-territorial operation of municipal laws, on which so much learning was exhibited, is purely beside the question. The Milanese law is only of importance to establish the validity of the contract at Milan, and to show that what Bellini had, was, according to that law, well transferred to Ricordi; that Ricordi came into this country the lawful owner, as against Bellini, and through him against all the world, of the manuscript, with all the rights incident to such ownership which the English law would attach to it. It will not be contended, of course, at this time of day, that our law does not regard contracts made abroad. But, as I thus limit the operation of the Milanese law, so, by parity of reason, I limit the operation of the English law to transactions in England; and if it requires any special formalities to the validity of the transfer of copyright, I say they were entirely out of the question as to giving effect to the transfer, which did, in fact, take place between Bellini and Ricordi in Milan.

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Having cleared the case as to that difficulty, I come to consider what rights of property Ricordi had, as the lawful owner of the unpublished manuscript, living in this country, and at first without reference to his being other than a domiciled native; that is, looking only to *the object itself. And I apprehend that he had the exclusive right of multiplying copies of it, with the necessary remedies for the vindication of that right in our courts of law. That copyright for the author of a literary work (and there is no distinction for this purpose between a literary and a musical composition, expressed in musical characters), exists by the common law, unless taken away by the statute of Anne, or some succeeding statute,

ought, I think, to be considered as settled by the judgment of the Court of Queen's Bench, in *Millar v. Taylor* (1), and by the all but unanimous opinions of the Judges, expressed in this House, in the case of *Donaldson v. Beckett* (2). At the time when those cases were decided, but one Judge on the Bench held a different opinion, and the LORD CHANCELLOR had acted in accordance with the majority. The point is one which is unaffected by lapse of time, change of circumstances, or advancement in science. The Judges of that day had every light by which to decide it, which we have now; all the difficulties which are presented now, were as ingeniously and forcibly presented then, and they did not prevail. If there was one subject more than another upon which the great and varied learning of Lord MANSFIELD, his special familiarity with it, and the philosophical turn of his intellect, could give his judgment peculiar weight, it was this. I require no higher authority for a position, which seems to me in itself reasonable and just; indeed, I do not know what point can be considered as concluded to any Court in this country, except that of your Lordships' House, if this is not.

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The reasons on which the judgment of that day rested, apply with equal force to the lawful owner or assignee, as they do to the author himself, to the *alien amy* in this country, as to the native subject; for the principle is *property. It is carefully established in the judgments in the Queen's Bench, that property was the foundation of the right; the author had the copyright because he was the owner—the Crown had copyright in certain books, because it had acquired the ownership by the outlay of money. Where there is the same reason, there must be the same law, if no statute intervenes to prevent it. *Ricordi*, being the lawful owner of an unpublished manuscript coming into this country, by the law of which a native author, because the owner of his manuscript, had copyright, would have it also, because, in regard of such property, the law of the country places an *alien amy* resident here in the same situation as a natural-born subject.

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This being the state of things at the common law, how is it affected by the statutes? Now, these either apply to such a case, or they do not. If they apply, they may be held to restrain the common law right, or to extinguish it, giving a new one in its place. If they do not apply in any particular case, then, in that case, the common law remains; for the repeal of the common law

(1) 4 Burr. 2303.

(2) *Id.* 2408; 2 Br. P. C. 129.

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is only inferential. It cannot be maintained, I conceive, that they do not apply for the benefit of foreigners, but do apply for their injury. Wherever they either extinguish or restrain, they also create a new right, or give a modified one. And this may be very reasonable; even a larger right may be attended with so many practical difficulties, in the way of enjoyment, that a more restrained one, properly guarded, and simplified, may be more beneficial. But it would be simply unreasonable and unjust to say, "You are not within our contemplation for the purpose of protecting the new right, but you are for that of extinguishing the old."

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If, then, I am right in supposing that a foreign author or owner of an unpublished manuscript, under the circumstances *of Ricordi, that is, being an alien friend in England, had, at common law, copyright in England, the construction of the statute becomes a matter of indifference as to the answer to your Lordships' questions. But, suppose that I am not, I apprehend it will not be denied that if Bellini, being here, had composed, or had come here with a work previously composed abroad, but remaining unpublished, he would have been within the provision of the statutes of Anne and George III., in respect of copyright, and might have conferred a good title on his assignee under those statutes respectively. No case, that I am aware of, has excluded from the benefit they confer, foreigners, except those who are resident abroad at the time when the right to the benefit must, if at all, attach. If this is so, on what ground is Ricordi the lawful owner of the unpublished manuscript by good conveyance from Bellini, and being in England, to be excluded?

The statute of Anne speaks, in respect of works already printed, "Of the author who hath not transferred to any other, the bookseller, the printer, or other person or persons, who hath purchased or acquired the copy of a book, in order to print the same;" and in respect of books, not then printed and published, it speaks of "the author and his assignee or assigns;" in both cases being entirely silent as to any special form of transfer or attestation, and using words which embrace assignees in law, and by devolution, as well as assignees by act of the parties. This is the part of the section which either confers or regulates the limited copyright, and because, in the penal part of the clause which follows, an exception is made in favour of those who are licensed by a consent in writing, attested by two witnesses, it has been twice held that the assignees in the first part must be such as claim under an assignment in

writing so attested: *Power v. Walker* (1); *Davidson v. Bohn* (2). It is remarkable that both these are cases merely of refusing a rule for a new trial, the latter mainly proceeding on the authority of the former, and neither of them fully argued; both, I must take leave to say with most sincere respect, founded on reasoning which is anything but satisfactory.

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Those who make light of the judgments in *Millar v. Taylor* and *Donaldson v. Beckett*, can scarcely object to a respectful difference in opinion from the Judges who decided these latter cases; but, assuming them to be well decided, it is clear that they left many supposable states of circumstances unaffected by their decision. Suppose, with reference to the first branch of the statute of Anne, the case of a purchaser before it passed, or that of a legatee or executor or an administrator after it passed, surely it could not be said, that they had no title because they claimed respectively under instruments without witnesses, or with only one. Indeed if the language of the decisions in both cases be looked to, it will be seen that the Judges had in contemplation only the precise cases before them respectively. They are, therefore, no authority where the facts are not only dissimilar, but fall under a different principle. Where the assignee and the licensee both claim under instruments executed in England, let the requirements of the statute as to one govern in regard to the other; this is the principle of the two cases; but where one purchases, or acquires, or becomes the assignee of the author's right, in a country in which the statute has no operation, the ground of the reasoning fails. Suppose an Englishman with undoubted English copyright, should, in Milan, license another to print and sell so many copies in England, by an instrument valid in Milan, but without attestation by two witnesses, could it be maintained that such printing and selling would be piratical, and subject the licensee to the penalties of the Act of Anne or George? Ricordi stands in this predicament; he has been, by a conveyance valid in Milan, substituted for the author; he does not claim under that conveyance English copyright, as existing at the time of the conveyance, and specifically conveyed by it, any more than if Bellini had died at Milan, having well bequeathed to him the unpublished manuscripts. But he claims to have been clothed by the conveyance from Bellini with all his rights, so that when he came to England he was, by the joint operation of it and the English law, entitled to all the rights of which the statute speaks.

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(1) 15 B. R. 378 (3 M. & S. 7).

(2) 6 C. B. 456.

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He is clearly within the enabling words of the statute; he is the assignee of an author; and even if these words may, in some cases, mean an assignee under an instrument in writing, attested by two witnesses, it has not been shown, or decided, that they must or can mean this in all cases. I think the contrary has been shown. Larger words, and less restrained, the Legislature could scarcely have used; and on what sound principle are we to import a restraint by implication?

I have already said, that I do not propose to go through the numerous cases on these two great branches of the subject, because they are fully before your Lordships. They must be admitted to be conflicting, and what is of more consequence, they may all be considered to be under review now in your Lordships' House. They can, therefore, hardly serve to conclude the question. But I may be excused a word in respect of the two which last preceded the case now in judgment, because they were very fully argued, and the principal preceding authorities reviewed in them, and because they have been much discussed in the arguments at your Lordships' Bar. I am desirous of seeing what they really profess to decide, and of respectfully considering *the weight of the arguments on which the judgments proceed.

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The first of these is *Chappell v. Purday* (1), decided in 1845. In that case it will be found that the plaintiff claimed under two assignments; the first by Latour alone, the second by Auber, Troupenas, and Latour: both, however, professed to be specific conveyances of copyright in England, not in an unpublished manuscript. At the dates of these respectively, the parties conveying had no such property as they professed to convey. The music being public at Paris, anyone who heard it and could carry it off might have gone into any other country, might certainly have come into England and made it public here without infringing any right of property in the owner of the work at Paris. What was public at Paris anyone procuring there might make public here without injury to the owner of the copyright there, because, merely as such owner, he had no right to exclusive publication here. The present case materially differs from that in this respect, that here the author, or his substitute, comes to this country with his work in such a condition that the English law of copyright, whether by common law or by statute, attached to it as much as if an Englishman had composed it in this country, and produced it for the first time from his writing case.

It is remarkable that an inaccuracy, not immaterial, has crept into the reported judgment in this case. The question is stated to be (1), "Whether a foreigner, residing abroad, and composing a work, has a copyright in England?" and the question is answered in the same page, by saying, "that a foreign author residing abroad, and publishing a work there, has not any copyright here," as if composing and publishing were the same thing. It is not *necessary in the present case to contravene what is said in that judgment respecting the intent of the British Legislature in the statutes of Anne and George III.; but with great respect I desire to guard myself from being supposed to agree with these remarks in all particulars, and exactly as they are expressed. I think it would be more true to say that the statutes were intended to extend to all persons who could bring themselves within their requirements. Many of these may be inapplicable to a foreign author resident abroad, and thence it is logical to infer that the statute was not made for him. But I see no logical sequence in thence inferring that "the assignee of a foreign author, whether a British subject or not, may not come within their protection." There is nothing, as it seems to me, absurd in supposing that the author can possess a subject-matter, which, from personal incapability of complying with the requisitions of the municipal law of this country, may be no property in him here; yet, which he may be able to pass to another not under the same incapability, in whom it may be property. And where the words of a statute are large, and admit of a liberal construction, I confess I do not see any legal or philosophical ground for giving them a narrow one. The political or economical ground, which was glanced at more than once in the argument of your Lordships' Bar, that the more tightly we drew the limits round the law of copyright, the more likely we were to induce foreign Governments to enter into treaties for international copyright, may be very cogent with aggrieved authors, but can surely have no place in influencing the decisions of a court of justice, when determining what is the common law, or how the language of a statute is to be construed.

In *Cocks v. Purday* (2), decided in 1848, the author was *a foreigner, residing in the empire of Austria. By a contract, valid by the law of the country, he assigned to another foreigner, also resident abroad, the unpublished manuscript, and his copyright in it. This foreigner, still so resident abroad, sold the English copyright

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(1) 69 B. B. 704 (14 M. & W. 316).

(2) 5 C. B. 860.

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in the still unpublished manuscript, to the plaintiff, resident in England. The instrument, clearly, would not have been valid for the purpose in England, but it was sufficient where made. The plaintiff made the proper entries at Stationers' Hall, and published in England, contemporaneously with a publication abroad. The questions were, whether there was a subsisting copyright? and whether the plaintiff was the proprietor of it? and both these the Court of Common Pleas, after a full argument, and time taken to consider, adjudged in favour of the plaintiff. It is obvious that this decision goes beyond what is necessary for the present case. It was found as a fact that, by the foreign law, the owner of copyright might transfer it to another, for another country, even after publication; but this assumption of extra-territorial power could not weigh at all in the decision of an English Court. The grounds of the decision are, that an *alien amy*, the author of a work, unpublished elsewhere, and first published by him in England, has copyright in that work by our law; and that any one claiming under him, by an instrument valid for the purpose where made, before publication and first publishing here, is a good assignee, within the third section of 5 & 6 Vict. c. 45. Now, I cannot perceive anything in the language of this statute from which a more favourable intent, as to foreign authors, is to be inferred, than from the language of the 8 Anne, or 54 Geo. III.; but I do perceive in both these statutes, that language is used as to licences less restricted than in the earlier statute, neither of them requiring the attestation of two witnesses to the licence. If *that case be law, it is a clear authority for the defendant in error, and the case of *Chappell v. Purday*, for the reasons I have given, is no authority against him.

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For the reasons I have given, I answer your Lordships' question by supporting the defendant's right of claim against the plaintiff in error; and these reasons have led me to so much greater length than I contemplated when I began, that I am compelled to omit some parts of the argument, and some of the objections to it, which I should otherwise have much desired to lay before the House.

Second and third. To your Lordships' second and third questions, I answer, for reasons I have already given, in the negative.

Fourth. If the work had been printed and published at Milan, before the assignment to the defendant, I think it would, according to the authorities, have made a difference. For that publication would have made it lawful for any one to publish in England.

Bellini, or his assignee in Milan, had not directly copyright in England. If either of them brought an unpublished manuscript to England, then the English copyright arose; but if the manuscript had been published before, and so put within the power and the right of all other persons as to copyright, out of the Milanese territory, Bellini or his assignee would have been on the same footing as any one of the public. An Englishman would have had the same right to publish Bellini's work as he would to publish Dante's; and that state of things is inconsistent with any exclusive right in Bellini or his assignee.

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Fifth. I think the answer to this question must be the same as to the fourth.

Sixth. I do not see that the limitation as to publication in this country made any difference.

Lastly. I think the learned Judge was wrong in directing the jury to find a verdict for the defendant.

MR. BARON ALDERSON :

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My Lords,—I have considered the various questions which your Lordships' have sent to her Majesty's Judges; and it seems to me that I shall answer them more clearly and distinctly by first stating what, according to my judgment, are the correct facts on which we are to proceed, and the true propositions of the law on this subject generally applicable to them (assigning my reasons for that opinion), and then adding my answers to each individual question separately, as corollaries from the general propositions of law, previously in my view of the case established.

And first, therefore, as to copyright after publication. It may be described as the sole right of multiplying copies of a published work. Whether this existed at common law, or was created by the statute for protecting literary property seems not material for the present case. Indeed, it seems strange to my mind to discuss this question in the case of a foreigner who is not bound, so long as he remains abroad, by our common law at all. But whatever the difficulties may have been originally, I had supposed that it had been considered as now settled, that either copyright was originally created, or, at all events, is now entirely regulated by, and in this country depends on, the statute of Anne. I think that this law, by which it is given and regulated, must be considered as a territorial law, applying only to persons who are under the ligeance of this country, unless there is something in the statute to give a more

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extensive operation to its provisions. This is to be shown by those who wish so to extend it; it is not sufficient for this purpose to show that there are expressions which may be so construed. They should go further, and show that they must be so. And this cannot be done. I think, therefore, that this, which is, in truth, a profitable monopoly, is a species of territorial property, which must *be regulated, as to its transmission, extent, and duration, by the law of this country, which created and regulates it.

In the case of an *alien amy*, he may, it is true, make himself capable of obtaining this right, by coming into this country, and first publishing his work here. But until he does that, he cannot, I think, have the right at all, and consequently cannot transmit what he has not yet acquired.

The learned counsel for the defendant in error, indeed, admitted very candidly that the statute of Anne was not intended to have any extra-territorial effect. But then they argued that this did not decide the question, because, as they said, that here, the assignee of the copy of the manuscript, before that time unpublished altogether, came into this country with that manuscript, and had then all the rights of publishing or refusing to publish, which the author himself originally had, and *inter alia* the copyright which the statute of Anne gave to the author or his assignee. And, in truth, this was the sum of their argument. Now, it may be safely admitted that the assignee had the sole and exclusive power to the individual copy of the manuscript assigned to him, and consequently the sole and exclusive power of first printing and publishing it. But whether that would give him the copyright is a very different thing.

The Act gives that right to the author and to the assignee, not of the manuscript, but of the copyright. And if the author has it only in a qualified way, viz., provided he be a British subject, or, being an alien, may become so by residing in England at the time when he assigns his right, then the assignee cannot possess by assignment what the author never had to assign, until he complied with the condition on which alone he could obtain it; and that is in truth the case here.

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But there is a further difficulty in the present case. Here the author, Bellini, had, as is stated in the bill of exceptions, a copyright, by the law of Austria, in the work. Now the law of Austria could give no right extra-territorial, or at least none which could be enforced here.

The right, therefore, of Bellini, which he assigned, was this Austrian or Italian copyright, capable of being there, and there only, enforced. And this he assigned to Ricordi, and nothing else. Ricordi does not assign this to the plaintiff, but he assigns to Boosey a right of solely publishing in England. This right he had not; it was no part of his Austrian copyright. But even if his copyright had been general, this is not an assignment of the copyright at all; it is at most a local licence from the assignee of the copyright to Boosey, with a covenant that he alone shall be allowed to publish the work here. Boosey, therefore, cannot, as I think, be treated as an assignee of the copyright of the author, for he has not the same right of publication as the author himself, which an assignee of the copyright has and must have. A licensee to publish solely within a limited district cannot, I apprehend, maintain this action at all, or, in any event, cannot do so in his own name, which Boosey is attempting to do here.

Again, in the judgment below it is said that Bellini having the copyright, it cannot be necessary that he should come to England, and that he may well act by agent in publishing here. But this is answered by the fact, that Ricordi in publishing here on his own account, and for his own profit, cannot, without a total disregard of all principles, be treated as an agent of the author who has assigned all his rights to him.

For these several reasons, therefore,—first, that Bellini had no English copyright which he could assign so long as he resided out of England, and, secondly, that he never *did assign to Ricordi anything more than what the Austrian law gave him; thirdly, because Ricordi never assigned to Boosey (even if Bellini had a general copyright, and had assigned it to him) anything more than a mere local licence solely to print and publish in England, which would not enable him to maintain an action in his own name, I am of opinion that the plaintiff in this case could not recover, and that the fact of his publication of the work in England gave him no right of action against the defendant.

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I think, also, that it is too late now to question the authority of the two decisions, *Power v. Walker* (1), and *Davidson v. Bohn* (2), by which the assignment from the author, in order to be valid, must be executed in the presence of two witnesses, and be in writing. But for the latter case it might have been said that the 54 Geo. III. c. 156, passed almost immediately after the case of

(1) 15 R. R. 378 (3 M. & S. 7).

(2) 6 C. B. 456.

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Power v. Walker, had, by taking away one principal reason for that decision, made it doubtful whether the assignment required now two witnesses. But *Davidson v. Bohn* is long subsequent to the 54 Geo. III., and is expressly in point. And the difference between the two provisions in 8 Anne and 54 Geo. III., the latter of which only in words requires the licence to be in writing, and not, as in 8 Anne, that it should be attested by two or more witnesses, does not seem necessarily to decide this point. The two clauses may stand together, and therefore the one does not necessarily repeal the other. I think, therefore, that *Davidson v. Bohn* may still be considered as governing this point; and certainly if it may, it is decisive of the question. For, granting that Bellini had a copyright which extended to England, it is clear that he must assign according to English law, in order to pass his English copyright; and then it is also decided by these cases that the assignment must be *in writing, and attested by two or more witnesses. Now the case finds that it has not been so assigned. Then the copyright did not pass to Ricordi, and if it did not, he could not convey what he never had to the plaintiff. Each of these propositions flows from the other. If the first proposition, therefore, is true, the consequences inevitably follow.

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I will now, with your Lordships' permission, shortly advert to the main cases which have been cited in the argument. I think there is no preponderance of authority against the above view of the case. It is said, and there is no doubt of it, that for injuries to his personal property or to his person, an *alien amy* may maintain an action in this country. The case of slander to his character, *Pisani v. Lawson* (1), was cited for this, and the running down the ship of an *alien amy* on the high seas is another instance. Nobody ever doubted this, since these decisions at all events; but I am at a loss to see what they have to do with this question, which is, whether an *alien amy* ever had the property which he has assigned here, and whether the plaintiff's right as the assignee of his assignee can be supported. This is an Englishman suing, and the contest is only as to the property. Those cases turn upon the question whether the *alien amy* can sue, the property injured being admitted to belong to him.

I come to the other cases, and it is marvellous to see how little real authority there is on either side. The first is a *dictum* of Lord THURLOW, in an argument as counsel at the Bar, in *Tonson v.*

(1) 54 R. R. 738 (6 Bing. N. C. 90).

Collins (1). Now, the argument of counsel, be he ever so eminent, is really nothing; for we do not know that it was his real opinion—it was useful to his case so to state the law. I think we may pass *over that as an authority. So, again, we need not be much embarrassed by *Bach v. Longman* (2), for many reasons. It amounts to this, that Baron Wood did not make this point there. Now, in the first place, the case did not require it; the case was sent by the Court of Chancery only to ascertain whether a musical composition was a book. The authority then amounts to this, that in arguing that question Baron Wood said nothing about a point which had no relation to the matter; but if he had made the point, the fact would have probably given an answer to it, for it is matter of history that Sebastian Bach was a foreigner residing in this country, and an artist in the service of the King of England. Yet this case was the authority on which the *dictum* of Lord ABINGER was founded in *D'Almaine v. Boosey* (3), which after all is only to this effect, that a foreigner residing here and publishing, may have a copyright, which is not now disputed, and is also not the point we are discussing here. *Clementi v. Walker* (4) may be classed with these authorities. As yet we have nothing like a decision on the point: the cases in *Simons* may be set off against each other. Then came the case of *Chappell v. Purday* (5), in which is a distinct opinion on this subject. That opinion was no doubt questioned in a very able judgment in *Cocks v. Purday* (6); but in neither of those cases does this exact point seem to have been precisely decided. And in *Boosey v. Davidson* (7), the Court of Queen's Bench simply adopts the view of the Court of Common Pleas in *Cocks v. Purday*. After all, this case is almost untouched by previous authority, and your Lordships have now to decide whether the judgment of the Court of Exchequer here, or *that of the Court of Exchequer Chamber, most accords with general principles. On this I have already stated my reasons, and the conclusions I draw from them, which have induced me to answer your Lordships' first question in the negative.

The second question of your Lordships, I answer thus: if the assignment to Ricordi had been made as suggested, it would have removed one difficulty in the case, but the result would be the same, that the plaintiff could not recover.

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(1) 1 Sir W. Bl. 301, 321.

(2) Cowp. 623.

(3) 41 R. B. 273 (1 Y. & C. 288).

(4) 26 R. B. 569 (2 B. & C. 861).

(5) 69 R. B. 698 (14 M. & W. 303).

(6) 5 C. B. 860.

(7) 13 Q. B. 257.

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To the third question, I give the same answer as to the second question.

As to the fourth question, it seems admitted by the Court below, that according to the cases, a previous publication abroad would have put an end to the plaintiff's right. But why should it do so if a foreigner and a British subject are *in pari casu*, as the Court below seems to say they are? A publication by an English author abroad does not, I apprehend, prevent his acquiring a copyright in England. It may, possibly, affect its duration; for the statute of Anne does not date the commencement of the term given from the first publication in England, but from the first publication. The clauses as to entry in Stationers' Hall, which no doubt point to a publication in England, are added to give a new and further remedy against those who infringe the right, and this remedy cannot be had till that is done. The fact that a previous publication abroad takes away the right of a foreigner, seems to me to show that the law applies only to persons who when they first publish in England have the right of then acquiring an English copyright. This qualification is everywhere, at all times, and under all circumstances, possessed by a British subject; but if it is not possessed by an *alien amy* till he comes to England with an unpublished work, he
[*919] *cannot, if he has before published abroad, acquire by a publication here which is not the first publication, a copyright in England. This is admitted to be so in fact, and this seems to me to show that the English subject and the *alien amy* are not *in pari casu* till the latter comes to this country.

To the fifth question, I answer the same as to the fourth question.

To the sixth, I answer that I think the suggested fact would make a difference. For then it would have been an assignment of the copyright, and not a mere licence to publish. But, as in the second question, I also wish to add, that I think it only removes one out of several fatal objections to the plaintiff's case.

To the seventh, I answer that I think the direction of the Judge and the verdict were right.

MR. BARON PARKE :

In answer to the first question proposed by your Lordships, I have to state that my opinion is, that the defendant in error, under the circumstances stated, had no right of action against the plaintiff in error.

In the first place, I am of opinion that Vincenzo Bellini, who

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was an alien, and at the time he composed his work, the piracy of which is complained of, and from thence to the time of the first publication thereof in England, was resident at Milan, never had any English copyright, nor could have had, by a first publication by himself of his work in England. The term "copyright" may be understood in two different senses. The author of a literary composition which he commits to paper belonging to himself, has an undoubted right at common law to the piece of paper on which his composition is written, and to the copies which he chooses to make of it for himself, or for others. *If he lends a copy to another, his right is not gone; if he sends it to another under an implied undertaking that he is not to part with it, or publish it, he has a right to enforce that undertaking. This sense of the word "copyright" has nothing to do with the present question, though, in the course of the argument, it has been sometimes used in that sense, when it was convenient to do so, particularly when it was contended that a copyright existed at common law. The other sense of that word is, the exclusive right of multiplying copies: the right of preventing all others from copying, by printing or otherwise, a literary work which the author has published. This must be carefully distinguished from the other sense of the word, and is alone to be looked at in the discussion of this case, and it would tend to keep our ideas clear in determining this question, if, instead of copyright, it was called the exclusive right of printing a published work, that being the ordinary mode of multiplying copies.

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Whether such an exclusive right belonged to any one at common law, is a question on which the highest authorities have differed. If it were necessary to give an opinion on that question, I should say that the rational view of the subject is most clearly against the existence of this right; and I believe that the weight of authority, taking into consideration the opinions expressed since the decision of the great cases of *Millar v. Taylor* (1), and *Donaldson v. Beckett* (2), and of *Hinton v. Donaldson* (3), quoted by *Mr. Quain*, at your Lordships' Bar, is likewise against it; and so is the opinion of foreign Judges administering English law. The expressions used by Lord KENYON in *Beckford v. Hood* (4), evidently show that such was his opinion, and *Lord ELLENBOROUGH, in *Cambridge University v. Bryer* (5) shows an inclination of opinion to that effect, to which may

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(1) 4 Burr. 2303.

Property, 8307.

(2) *Id.* 2408; 2 Br. P. C. 129.

(4) 4 R. R. 527 (7 T. R. 620).

(3) Dict. of Decisions, tit. Literary

(5) 16 East, 317.

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be added the authority of the majority of the American Judges in *Wharton v. Peters* (1), cited by my brother *Byles*.

But whether such an exclusive right of multiplying copies in this kingdom exists or not at common law, in favour of a subject of this country, it is clear that it does not exist in favour of a foreign author living abroad. By the municipal law of his own country he may have such a right, but that law has no extra-territorial power, and does not give him a right here. And it seems to me extravagant to contend that by natural law, or, as Lord MANSFIELD says, *Millar v. Taylor* (2), by "the principles of right and wrong, the fitness of things, convenience and policy, and therefore by the common law," or by the comity of nations, the subject of one country, on the publication of his works in other countries, has an exclusive right to the multiplication of copies in those countries, and can oblige the Courts in each country to protect him in the exercise of that right. This point has not been disputed in the argument at your Lordships' Bar.

The only question, then, is, whether this exclusive right is given to a foreigner, resident abroad, by virtue of the statute law; and the statutes in force at the time applicable to this case are the 8 Anne, c. 19 (3), and the 54 Geo. III. c. 156 (3). If a judicial construction had been put on these Acts, by a direct and deliberate decision of a superior Court, we, if sitting in another court of co-ordinate jurisdiction, should probably feel ourselves bound by that construction, leaving it to be questioned in a court of error; but, as advising the highest tribunal in the land, we should not consider ourselves precluded by *one judgment, of an inferior tribunal, from putting the construction which we think ought to be given to the statutes: we should require more. But, in truth, before the case of *Chappell v. Purday*, in the Court of Exchequer, 1845 (4), and of *Cocks v. Purday* (5), followed by that of *Boosey v. Davidson* (6), and *Boosey v. Purday* (7), the first and last of which are conflicting with the two others, there is no authority on this subject which, properly considered, ought to be of any weight at all in deciding this case.

All the authorities, prior to the first of these cases, have been collected in the reported judgment of Lord CAMPBELL in the Exchequer Chamber (8), now brought up by writ of error into your

(1) 8 Peters' Rep. Supr. Ct., U. S. 591.

(2) 4 Burr. 2398.

(3) Repealed, 5 & 6 Vict. c. 45, s. 1.

(4) 60 R. R. 698 (14 M. & W. 303).

(5) 5 C. B. 860.

(6) 13 Q. B. 257.

(7) 80 R. R. 495 (4 Ex. 145).

(8) 6 Ex. 580.

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Lordships' House. Of the authorities on which that judgment relies, the first in order of time is that of *Tonson v. Collins* (1). The supposed authority is that of Lord THURLOW, who, when he was counsel, in arguing that there was no copyright at all at common law, remarked that some part of the special verdict was out of the case, as it was of no consequence whether the authors were natural-born subjects or not, because the right of property, if any, was personal, and might be acquired by aliens. The special verdict, in the part referred to by Lord THURLOW, states that the *Spectator* (the work pirated), was an original composition by natural-born subjects, resident in England. This is, surely, no authority whatever; it is the mere *dictum* of counsel, and, after all, only amounting to this, that if authors resident in England composed a work, it matters not as to the right to copyright whether they be natural-born subjects or not—a point which no one has disputed. The *second is that of *Bach v. Longman* (2). It is said that in that case, Baron Wood, at the Bar, although the plaintiff was a foreigner, did not take the objection. As little can the implied admission of counsel be an authority as his positive *dictum*; but, in truth, it does not appear, except by conjecture from the name, that the plaintiff was a foreigner. Nor does it appear in any manner, if he was a foreigner, that he was not resident in England when he published his work. It may be rather inferred that he was, for he applied for and obtained the Royal licence for the sole printing and publishing the work for fourteen years; and I believe it is well known that he was organist in the Chapel Royal. Further, the sole question in the case sent from the Court of Chancery to the Court of King's Bench was, whether a musical composition was a work within the statute 8 Anne. Therefore it was impossible for Baron Wood to have made such a point, if he thought it tenable. These two cases do not furnish the semblance of an authority on the question in this case. *D'Almaine v. Boosey* (3), before Lord ABINGER, in which he granted an injunction against the infringement of a foreigner's copyright, was decided immediately on the argument, without time taken to consider, and entirely on the supposed authority of *Bach v. Longman*, the circumstances of which had evidently escaped the recollection of the learned Judge, for the point never was, or could be, argued or decided in that case. The case of *D'Almaine v. Boosey*, therefore, is no authority whatever. Then followed the

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(1) 1 Sir W. Bl. 301.

(3) 41 R. R. 273 (1 Y. & C. 288).

(2) Cowp. 623.

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case of *De Londre v. Shaw* (1), which was a bill to restrain the defendants from pirating the plaintiff's trade marks. The Vice-Chancellor SHADWELL remarked, that a Court does not protect the copyright of a foreigner. *It is certainly a *dictum* only, but, as far as it goes, is against the claim of the plaintiffs below; but little reliance can be placed on it, for the learned VICE-CHANCELLOR afterwards, in *Bentley v. Foster* (2), expressed a different opinion, and directed the plaintiff to bring an action to try the right. The case of *Clementi v. Walker* (3) was decided on the ground that, before the author, a foreigner, came to England, and assigned, or rather attempted to assign, his copyright to the plaintiff, the work had been published in France, and so there was no first publication in England. The point, whether a foreigner who resided continually abroad, as the author in the present case did, could have a copyright, did not arise. The only remaining case prior to the recent decisions, already mentioned, is *Page v. Townsend* (4). That arose on the Acts for the protection of engravers, 8 Geo. II. c. 13, s. 1; 7 Geo. III. c. 38; 17 Geo. III. c. 57. The VICE-CHANCELLOR (SHADWELL) held, that the object of the Acts was to protect works designed or engraved in England; but, as he held that the last statute, in which these words were expressed, was *in pari materia* with the others, these words were to be implied in the other Acts (5); and this case cannot be relied upon as an authority either way.

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Looking at the state of the decisions up to this time, it is out of the question to say that there was any authority of the most trifling value, still less any binding authority, as to the construction of the Copyright Acts. Then occurred the case of *Chappell v. Purday* (6), in which the Court of Exchequer intimated the opinion, that copyright depended on the proper construction of the statutes 8 Anne and 54 Geo. III., that it was perfectly open to the *Court to decide upon the proper construction, and that the opinion of the Court was, that those statutes gave a copyright only to British subjects, either natural-born or by residence. The Court of Common Pleas took a different view in the case of *Cocks v. Purday* (7), though, in looking at the report, I cannot find that the Court addressed much, or indeed any, attention to the construction of the statute of Anne,

(1) 2 Sim. 237.

(2) 10 Sim. 329.

(3) 26 R. R. 569 (2 B. & C. 861).

(4) 35 R. R. 174 (5 Sim. 395).

(5) See an able Essay on the subject

of "The Laws of Artistic Copyright, by D. R. Blaine, Esq., Barrister-at-law."

(6) 69 R. R. 698 (14 M. & W. 303).

(7) 5 C. B. 860.

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upon which the right to copyright is founded, and on which construction alone the Court of Exchequer formed its opinion. The Judges seem to have supposed that the Court of Exchequer had doubted upon the right of an alien friend to personal property, and all other personal rights in England, a point which that Court had not the least idea of bringing into question. This decision of the Court of Common Pleas was followed by the Court of Queen's Bench, in *Boosey v. Davidson* (1), without further comment. In this state of conflicting authorities, the Judges in the Court of Exchequer decided the case of *Boosey v. Purday* (2), acting upon their own opinion; and in conformity with the authority of that case the law was laid down by Lord CRANWORTH, on the trial of the cause now before your Lordships, and that opinion was excepted to.

This review of the authorities appears to me to show, that the only question now is, as to the true construction of the statute 8 Anne, c. 19 (for the 54 Geo. III. does not change it). Copyright, as it affects this case, depends upon this Act, and this high tribunal is called upon to construe it, entirely unfettered by decision. What, then, is the true construction of the statute of Anne, and of the 54 Geo. III. c. 156? The statute of Anne is entitled, "An Act for the Encouragement of Learning, by vesting the *Copies of printed Books in the Authors and Purchasers of such Copies;" and, after reciting the practice of publishing copies without the consent of the authors or proprietors, for preventing such practices, and for the encouragement of learned men to compose and write useful books, it provides that the author, or his assignee, shall have the sole liberty of printing such books for the term of fourteen years, to commence from the day of first publishing the same. The Act of 54 Geo. III. c. 156, recites that it will afford further encouragement to literature if the duration of such copyright should be extended, and it extends the fourteen years to twenty-eight, and if the author be living, till the end of his life. The object of these Acts most clearly is, as is expressed in the Acts themselves, for the encouragement of learning, by encouraging learned men to compose and write useful books, by giving them as a reward the sole right of printing their works for a term. It is clear that the Legislature has no power over any persons except its own subjects, that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them; and when legislating for the

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(1) 13 Q. B. 257.

(2) 80 R. R. 495 (4 Ex. 145).

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benefit of persons, must, *primâ facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect.

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General words have been held to have such a limitation. The Acts relative to legacies have been confined to English domiciled subjects—*Thomson v. The Advocate-General* (1), *Attorney-General v. Forbes* (2), and in *Arnold v. Arnold* (3) Lord COTTENHAM observes, “that when the Act speaks of any will of any person, and of the legacies payable out of the personal estate, it must be considered as speaking of *persons and wills and personal estate in this country, that being the limit of the sphere of the enactment.”

When, therefore, the Legislature offers to authors a reward for their ingenuity and labour, at the expense of the subjects of the realm, in the shape of an exclusive right of printing the result of those labours for a term, and so making the acquisition of the printed work dearer to all over whom their authority extends, I cannot doubt that it was meant to benefit English authors only. Whatever construction ought to be put upon this statute in the time of Queen Anne, ought to be put now. We must read and understand it exactly in the sense we should have done then. The construction cannot vary from time to time, according to the prevailing opinions as to the proper course of policy to be pursued in our intercourse with strangers. It is rather a startling proposition that the Parliament of Queen Anne meant to foster and encourage foreign authors at the expense of the British public. It is said that learning would be encouraged by the introduction of foreign books which might not otherwise be imported, but it is expressly declared in the Act itself, that it is for the encouragement of learned men to compose and write, not for the encouragement of the importers of books. It would be of small advantage indeed to the community, and an inadequate reward to the first importer, to allow him to have a monopoly, and thereby increase the price of the book to the public: for if the book was of real value, doubtless it would be imported for the use of British readers. And if the introduction of books had been the object, why not give the exclusive right of printing to the first importers? It was indisputably the intention of the framers of the Act to reward authors, not importers; and what benefit could the British public derive from the encouragement of foreign authors?

(1) 69 B. R. 1 (12 Cl. & Fin. 1).

(3) 2 My. & Cr. 256, 270.

(2) 37 B. R. 12 (2 Cl. & Fin. 48).

I must say that I feel no doubt that the benefit is to be given to English authors only, and in that category are to be placed not merely subjects of the Crown by birth, but subjects by domicile or residence, or even, perhaps, by personal presence here at the time of composing the work, or at least at the time of first publication; for even those owe a temporary allegiance, and are bound by our law, and probably ought to have a corresponding benefit—questions now not necessary to be considered.

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It is no answer to the argument that the Legislature meant to give the privilege only to English authors, that if residence or personal presence here would be enough, it could be easy to procure that title by taking the trouble of a journey to England, and remaining for a short time, and thus the intended benefit to British subjects would be evaded. It might, it is true; but then there would be some cost of time and trouble, much more in the time of Queen Anne than now; and it is no valid argument against the construction that the Legislature meant to confine the reward to subjects, that there might be some cases in which that intention could be defeated with no great trouble. That is no reason for holding that aliens should enjoy the right without any trouble at all. It would be rather an argument against construing the Act in favour of persons who came into England, not to reside, but merely to publish.

It is said that the same construction ought to be put on the Copyright Acts as upon the Patent Acts. I think not. The Patent Act, 21 James I. c. 3, was in restraint of the prerogative, the King having always had the power of granting monopolies of new inventions, as the chief guardian of the common weal, for the sake of the public good; and this power extended to new discoveries only, “to wit, to one who hath brought in a new invention and new trade *within the kingdom”: *Cloth-workers of Ipswich* case (1); and the statute 21 James I. c. 3, abolishes monopolies, except grants for the sole working or making of new manufactures within the realm, to the true and first inventor of such manufactures, which are of the same force as at common law. Taking the common law and the exception of the statute together, it could not be doubted that a patent could be granted to one who first introduced a new manufacture from beyond sea, “for the statute speaks of new manufactures within the realm;” and if they are new here, they are within the statute, and new devices useful to

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(1) Godb. 252.

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the kingdom, whether learned by travel or by study, it is the same thing, and therefore it was so decided in *Edgebery v. Stephens* (1). As the King has the discretion to give the patent right to whom he will at the common law, he probably may, in respect of the value of the invention, give it to an alien resident abroad, though that point has never been decided. But the Crown is not bound to give it to any person whatever; it is entirely in its discretion. But in the case of copyright there is no power of selection in the Crown, and an alien, if entitled under the Act on that subject, would be entitled absolutely, whatever the value of his work or its merit may be. The right is given to every author.

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There is an argument mentioned at the Bar, arising out of the International Copyright Act, 1 & 2 Vict. c. 59, repealed and re-enacted, with additions, by 7 Vict. c. 12 (2), which ought to be noticed. It is that if aliens living abroad could obtain a copyright under those Acts by first publication in England, and could make the first publication by the new device of simultaneously publishing abroad and in England (a device of very questionable *validity, if the state of the authorities permitted it to be questioned), there would be an end of the advantages which we could offer to foreign countries, the United States of America for instance, who recognise no copyright but to citizens of those States, as an equivalent for a copyright in that country, a copyright of incalculable advantage to all British authors, the value of whose works would be greatly multiplied from the increased number of readers who speak the same language. This is quite true at present. If the decision of the Court of Exchequer Chamber is law, every American author can obtain the right of sole publication of his own work here, if he takes care to publish it on the same day in his own country. But our decision ought not to proceed on the ground of public policy, at all events not in the sense of political expediency, which this is, but we must give that construction which we think properly belongs to the Acts of Parliament, on which the right depends.

I therefore, for these reasons, come to the conclusion, that Bellini, being resident abroad from the time of the composing to the time of the publication of his work, never did or could acquire an English copyright. This is a sufficient answer to the first of your Lordships' questions; for if he never had a copyright, the defendant in error, who claimed only under him, could maintain no action for infringing the supposed right. But, in the next place, supposing

(1) 2 Salk. 447.

(2) See also 15 & 16 Vict. c. 12.

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the above reasoning to be incorrect, and that Bellini had an English copyright by first publication by him, or his assigns, in England, I am of opinion that there is a defect in the title of the defendant in error. First, according to the statement introducing your Lordships' first question, Bellini, who had a copyright by the laws of Milan, assigned that copyright only to Ricordi, under whom the defendant in error claimed; such assignment, *therefore, passed the Milanese copyright only. Secondly. If the terms of the assignment were capable of transferring all his copyright, wherever it existed, and consequently the English copyright, the assignment to Ricordi would be void, as not being made in the presence of two witnesses, according to the case of *Power v. Walker* (1), and of *Davidson v. Bohn* (2), if these cases are applicable to transfers since the 54 Geo. III. c. 156. These cases decided that such a form of assignment was necessary in English copyrights transferred in England, on the ground that, as the statute of Anne required a simple licence to be executed in the presence of two witnesses, it was reasonably to be inferred that the Legislature meant that the transfer of the whole interest should not pass without an instrument of similar solemnity.

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A question now, however, arises, whether, since the 54 Geo. III. c. 156, and before the 5 & 6 Vict. c. 45, an assignment in writing only, without attesting witnesses, might not be sufficient. This point was not raised in *Davidson v. Bohn*, probably because the assignment therein mentioned was before the 54 Geo. III. That statute does not expressly repeal the clause of the statute of 8 Anne, from which the necessity of attesting witnesses arises. The question is, whether it impliedly repeals it. The provision in the statute of Anne is, that a licence shall be in writing, signed in the presence of two witnesses. In the statute 54 Geo. III., it is that it shall be in writing. But both being affirmative enactments, not inconsistent with each other, it may be said at first sight that there is no implied repeal. The statute 5 & 6 Vict. leaves no doubt, for it expressly repeals the whole of the statute of Anne, and an assignment may now undoubtedly be made in writing, unattested, as well as by entry in the registry *of the Stationers' Court. But I also think, after much consideration, that the 54 Geo. III. impliedly repeals the statute of Anne. It provides that all book-sellers and others, who print and publish without the consent, in writing, of the proprietor, should be liable to an action. It implies,

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(1) 15 B. R. 378 (3 M. & S. 7).

(2) 6 C. B. 456.

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therefore, that if any bookseller or other person prints and sells with any licence, in writing, he is not to be liable to an action. Any licence, therefore, in writing, being sufficient to give a man authority to print and sell, and, therefore, to give him a partial interest, it follows, according to the reasoning in the case of *Power v. Walker*, that there is no longer any ground for requiring more than an assignment in writing, in order to give the entire interest in a copyright to an assignee. Assuming it, however, to be the law, that at the time of the transfer in question, an attested instrument was required in England, then the assignment of an English monopoly, being the exclusive right of printing and publishing within the English territory, clearly required to be attested by two witnesses.

Although, according to international law, generally speaking, personal property passes by transfer conformably to the law of the domicile of the proprietor, yet if the law of any country requires a particular mode of transfer, with respect of any property having a locality in it, that mode must be adopted: Story, *Conflict of Laws* (1), and Lord KENYON, in *Hunter v. Potts* (2). The sole right of printing copies of a work, and publishing them within the realm, is clearly of a local nature, and, therefore, must be transferred by such a conveyance only as our law requires.

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I answer the second and third questions in the negative, that the attestation of the deed in each case would have made no difference, because I am of opinion that Bellini himself never could have had any English copyright, supposing *that he had remained at Milan from the time of his composing to the time of the first publishing his composition, and, therefore, his assignees, by whatever form of conveyance, and with whatever solemnities they might claim, would have none.

For the same reason I answer the fourth and fifth questions in the negative. It may be added, that a prior publication abroad would, according to the case of *Clementi v. Walker* (3), at all events prevent the plaintiff from recovering.

To the sixth question I answer, that if the assignment to the defendant in error had not contained the limitation as to the publication in this country, it would have made no difference in that respect, being of opinion that the defendant had no copyright to assign. But if he had such a right, it was the statutory right,

(1) Sa. 383, 398.

192).

(2) 2 R. R. 353, 354 (4 T. R. 182,

(3) 26 R. R. 569 (2 B. & C. 861).

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by 54 Geo. III. c. 156, to the sole privilege of printing copies in the United Kingdom, or any part of the British dominions. And I am of opinion that this is an indivisible right, and the owner of it cannot assign a part of the right, as to print in a particular county or place, or do anything less than assign the whole right given by the English law. It seems to me that it is analogous to an exclusive right by patent, which cannot, I apprehend, be parcelled out, though licences under it may.

And, lastly, looking at the record, as set out in the bill of exceptions, the learned Judge who tried the cause was, in my judgment, perfectly right in directing the jury to find a verdict for the defendant.

The only doubt arising from the form of the question lastly proposed by your Lordships is, that in the record a certified copy of the register book of the Company of Stationers is stated to have been produced; and that by *the 5 & 6 Vict. c. 45, s. 11, is made *prima facie* proof of proprietorship therein expressed, but subject to be rebutted by other evidence; and therein arises a question, whether the other evidence produced by the plaintiff below himself does rebut it. I am of opinion that the evidence of Bellini, being a foreigner, for the reasons above mentioned at length does rebut it; for a foreigner resident abroad cannot have it, and therefore the certified copy of the entry proves no title in the plaintiff. And if your Lordships shall be of opinion that a foreigner resident abroad has such a copyright, I think the evidence set out on the bill of exceptions does sufficiently rebut the title of the plaintiff below; because it sufficiently appears that the conveyance to the plaintiff of the right in the United Kingdom, was the assignment under which the plaintiff claims. But he has no title, because a part of a copyright cannot be assigned. The other objection, that Bellini did not assign the whole of his copyright, but only the copyright in Milan, does not, I think, sufficiently appear, so as to rebut the *prima facie* inference arising from the evidence of the entry.

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On the whole, I think that the learned Judge was perfectly right in his direction to the jury.

LORD CHIEF BARON POLLOCK:

My Lords,—In answer to the first question proposed by your Lordships, I have to state my opinion that, assuming the facts stated in that question to be true, the publication by the plaintiff in error did not give the defendant in error any right of action against him; and the grounds upon which I have formed that op

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such, that, in answer to the second, third, fourth, fifth, and sixth questions, I am of opinion that (assuming the facts to be true which in those questions respectively are supposed), they would *not have made any difference. And, lastly, looking to the record, I am of opinion that the learned Judge who tried the cause was right in directing the jury to find a verdict for the defendant (now the plaintiff in error).

The answers to these questions depend upon some more general propositions, as to which I propose to state my opinions to your Lordships.

The first is, whether, by the common law of this country, the author of any published work has an exclusive right to multiply copies, that is, is entitled to what is commonly called copyright? This is a question upon which very great names and authorities are arrayed on either side. Some of the greatest lawyers have been of opinion that by the common law such an exclusive right existed, while it has been denied by others of at least equal authority. The whole question is most ably and elaborately argued and discussed on both sides, and all the authorities then existing are collected with great research in the celebrated case of *Millar v. Taylor* (1) ; and I entirely agree with my brother PARKE, that the weight of mere authority, including the eminent persons who have expressed an opinion on the subject since the case of *Millar v. Taylor* was argued, is very much against the doctrine of a copyright existing at the common law.

[*936] In Mr. Justice WILLES' judgment (giving a very able, elaborate, and learned exposition of the whole subject) he appears to think that, because, upon general principles, he has satisfied himself of the justice and propriety of an author possessing such a right, therefore by the common law it exists. The passage is a remarkable one, and shows what were his views of the common law, and what, probably, he thought would not be considered strange or novel by the rest of the Judges. It is this : *he is speaking of the allowance of "copy" as a private right ; and he says, "It could only be done on principles of private justice, moral fitness, and public convenience, which, when applied to a new subject, make common law without a precedent." My Lords, I entirely agree with the spirit of this passage, so far as it regards the repressing what is a public evil, and preventing what would become a general mischief ; but I think there is a wide difference between protecting the community against a new source of danger, and creating a new

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right. I think the common law is quite competent to pronounce anything to be illegal which is manifestly against the public good ; but I think the common law cannot create new rights, and limit and define them, because, in the opinion of those who administer the common law, such rights ought to exist, according to their notions of what is just, right, and proper. This ground or method of arguing for a common law right has not been adopted at your Lordships' Bar. The ground taken by the learned counsel for the defendant in error, on this part of the case, has been that an author has the same property in his composition, being his own creation or work, as a man has in any physical object, produced by his personal labour. If such a property exists at common law, it must commence with the act of composition or creation itself, and must, as it seems to me, be independent of its being reduced into writing ; it must also be independent of whether the author is willing to furnish copies at a reasonable price (which Mr. Justice WILLES made one of the points in his judgment). If it is the author's property, he may give or withhold it, as he pleases ; he may communicate it to the public with a liberal or niggardly hand, or withhold it altogether. And the same principle must be applicable to every other creation, invention, or discovery, as well as a *poem, a history, or any other literary production. It must apply to every other offspring of man's imagination, wit, or labour ; to discoveries in science, in the arts, and manufactures, in natural history ; in short, to whatever belongs to human life. An ode, composed and recited by an ancient bard at a public festival, is as much the creation of his genius, and is published by the recitation, though not in the same degree, as the poem of a modern author, printed and sold in Paternoster Row. The speech of the orator, the sermon of the preacher, the lecture of the professor, have no greater claim to protection, and to be the foundation of exclusive property and right, than the labours of the man of science, the invention of the mechanic, the discovery of the physician or empiric, or indeed the successful efforts of any one in any department of human knowledge or practice. And it is difficult to say where, in principle, this is to stop ; why is it to be confined to the larger and graver labours of the understanding ? Why does it not apply to a well-told anecdote, or a witty reply, so as to forbid the repetition without the permission of the author ? And, carried to its utmost extent, it would at length descend to lower and meaner subjects, and include the trick of a conjuror, or the grimace of a clown.

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Weighing all the arguments on both sides, and looking to the authorities up to the present time, the conclusion I have arrived at is, that copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind assembled in communities, but is a creature of the municipal law of each country, to be enjoyed for such time and under such regulations as the law of each State may direct, and has no existence by the common law of England. It would follow from this, that copyright in *this country depends altogether on the statutes which have been passed on this subject; and the next question is, What is the true construction of the various statutes; viz., the 8 Anne, c. 19, and the 54 Geo. III. c. 156, now merged in the 5 & 6 Vict. c. 45?

The laws of foreign nations have no extra-territorial power, so as to give to Bellini a copyright in this country, on the ground that he possessed such a right at Milan; and the English statutes on copyright do not, according to their true construction, in my judgment, apply to a foreign author residing abroad, or to his assigns. Such foreign author is not within the scope and meaning of the Acts of Parliament referred to, and probably it is better that the rights of foreigners should be the subject of treaty confirmed by Act of Parliament (by which means the corresponding or correlative interests of British subjects in foreign countries may be secured); but whether better or not, I am of opinion that neither Bellini nor his assigns acquired any copyright in this country. This question has been twice lately before the Court of Exchequer; first, in the case of *Chappell v. Purday* (1), and again in the case, more exactly resembling the present, of *Boosey v. Purday* (2). Each of these cases was fully argued, and the deliberate and unanimous judgment of the Court was delivered by myself. I have discovered no reason and have heard no argument that induces me to alter the judgment pronounced in the latter case; and after the opinions that have been already delivered, examining the various cases, I do not think it is necessary to do more than refer to the judgment already pronounced by the Court to which I belong, in the case of *Boosey v. Purday*, for the grounds on which my opinion is still in accordance

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*with that judgment as far as the decided cases are concerned.

In the judgment of the Court below, an opinion is expressed that in the statutes on copyright, the word "author," includes a foreign author resident abroad; but, with all respect for the argument

(1) 69 R. R. 608 (14 M. & W. 303).

(2) 80 R. R. 495 (4 Ex. 145).

presented by that judgment and the views there stated, I have been unable to arrive at the same conclusion. The statutes of this realm have no power, are of no force, beyond the dominions of Her Majesty, not even to bind the subjects of the realm, unless they are expressly mentioned, or can be necessarily implied, and I apprehend it becomes therefore a rule in construing a statute not to extend its provisions beyond the realm, whether to create a disability or to confer a privilege. An alien residing here owes a temporary allegiance to, and, while resident, is one of Her Majesty's subjects; he owes obedience to the law, and is therefore entitled to the benefit of it, and I think he is an author within the meaning of the statute; but it appears to me that an alien resident abroad was not at all contemplated by the Legislature, and is not within any of the provisions of the Act. It seems conceded that if a foreign author first publishes his work abroad he cannot have a copyright in England; but why is this so, if such foreign author can be included within the enactments of the statute? The third section of the Act which confers copyright makes no distinction in words between a publication "in the lifetime of the author" in this country, and anywhere else. Again, the sixth section, which requires copies to be delivered to the British Museum, seems to confine the operation of the Act to the British dominions. From the whole tenor of this and all the other statutes, it seems to me that a foreign author resident abroad was altogether out of the contemplation of the Legislature in framing the "statutes which have created copyright, and therefore Bellini, living at Milan, and not having published his work in any part of Her Majesty's dominions, had no property to convey, no interest or right to assign.

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This view of the subject necessarily leads to the answers I have given to your Lordships' second, third, fourth, fifth, and sixth questions. I think the varied circumstances suggested in those questions would not have made any difference, because I think the statute did not give to Bellini any right or interest which could be conveyed or assigned to Ricordi. But I think it respectful to your Lordships' questions to give some further answer to them. In answer to the second question, I think if Bellini had, with reference to the laws of this country, any right, interest, or property to assign, an assignment valid by the laws of Milan, would have been sufficient, inasmuch as "copyright" is expressly enacted to be "personal property," and would therefore pass according to the laws of Milan, where the transfer took place. In answer to the

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third question, I think it very doubtful whether copyright can be at all partially assigned. I am clearly of opinion that in this country the proprietor of the copyright could not assign it with reference to one country to one person, and with reference to another country to a different person, so as to give to each a right to maintain an action for infringing the copyright. Now, the statute in force at the time of this transfer was the 54 Geo. III. c. 156. The fourth section of that Act makes copyright under the statute commensurate with the British dominions, and I think it is a right or property which is not capable of being divided into parts and divisions according to local boundaries. It appears to me, therefore, that the assignment to the defendant in error being for publication in the United Kingdom only, and not all the *British dominions, would operate as a licence only, and would not by the laws of the country enable the defendant to sue at law as the proprietor of the copyright for the United Kingdom only. It seems agreed on all hands that a publication at Milan before the assignment would have been fatal to any claim to copyright in this country; and (if it existed) I am of opinion that a subsequent publication at Milan, but before publication here, would also have defeated it.

LORD CHIEF JUSTICE JERVIS:

My Lords,—Before I answer the question proposed by your Lordships, I wish to consider the record and the points which arise upon it, because it involves several technical considerations, some of which also appear upon your Lordships' questions, which might determine this writ of error, without pronouncing an opinion upon the main subject.

The party who excepts to the ruling of a learned Judge must show clearly, upon his bill, that the learned Judge was wrong. Every fair intendment must be made in favour of the summing-up, and if, therefore, it is not apparent upon the record that the direction was wrong, the verdict must stand.

The first point of a technical nature which arises upon the bill of exceptions, and is also presented by your Lordships' last question, is, whether the certified copy of the Register Book, at Stationers' Hall, without more, entitled the plaintiff below to a verdict in his favour? In my opinion it did not. The statute 5 & 6 Vict. c. 45, s. 11, only makes such certificate *prima facie* evidence of the proprietorship therein expressed, subject to be rebutted by other

evidence, and, for the reasons which I shall give hereafter, I think that such *prima facie* title is rebutted by the other evidence set out upon the record.

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The second point is likewise of a technical nature, and is involved also in the first and some other of your Lordships' questions. The bill of exceptions states that, by the law of Milan, Bellini was entitled to copyright in his book, and to assign the same, and that he did, by an instrument in writing, signed and executed by him according to the law of Milan, assign the said copyright to Ricordi. Construing this allegation by the rules applicable to bills of exceptions, there can be no doubt that the words "said copyright," refer to the copyright before mentioned; viz., the copyright to which Bellini was entitled by the law of Milan; and as by the law of Milan Bellini could have no copyright elsewhere, it follows that even if Bellini had, by the law of England, a copyright in England, it did not pass by this assignment to Ricordi. This point, in my judgment, is decisive of the writ of error; but, inasmuch as the parties have, not improbably, stated the assignment in this form by mistake, and your Lordships desire the opinion of the Judges upon other questions, I proceed to consider the principal subject.

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Before doing so, however, there is another point, of a somewhat technical character, arising upon the bill of exceptions, and forming the subject of your Lordships' second question, which may here conveniently be disposed of. It does not appear upon the bill of exceptions that the assignment by Bellini to Ricordi, at Milan, was attested by two witnesses; on the contrary, as every fair intentment must be made against the party who excepts to the summing-up, it must be taken after verdict that the assignment was not so attested. Upon this subject I have entertained some doubts, but upon consideration am of opinion that two witnesses were not necessary. I do not adopt the argument at the Bar, that, being personal property, copyright would pass by a mode of transfer legal *in the country where the proprietor was domiciled, because, although that is the general rule with respect to personal property, it is subject to an exception where the personal property, as in this case English copyright, has a locality in a country which prescribes a particular form in which alone it can pass. My opinion is formed upon the difference which will be found in the wording of the statutes 8 Anne, c. 19, and 54 Geo. III. c. 156 (1). If the case was governed by the statute of Anne, I should think it clear that two witnesses

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Weighing all the arguments on both sides, and looking to the authorities up to the present time, the conclusion I have arrived at is, that copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind assembled in communities, but is a creature of the municipal law of each country, to be enjoyed for such time and under such regulations as the law of each State may direct, and has no existence by the common law of England. It would follow from this, that copyright in *this country depends altogether on the statutes which have been passed on this subject; and the next question is, What is the true construction of the various statutes; viz., the 8 Anne, c. 19, and the 54 Geo. III. c. 156, now merged in the 5 & 6 Vict. c. 45?

The laws of foreign nations have no extra-territorial power, so as to give to Bellini a copyright in this country, on the ground that he possessed such a right at Milan; and the English statutes on copyright do not, according to their true construction, in my judgment, apply to a foreign author residing abroad, or to his assigns. Such foreign author is not within the scope and meaning of the Acts of Parliament referred to, and probably it is better that the rights of foreigners should be the subject of treaty confirmed by Act of Parliament (by which means the corresponding or correlative interests of British subjects in foreign countries may be secured); but whether better or not, I am of opinion that neither Bellini nor his assigns acquired any copyright in this country. This question has been twice lately before the Court of Exchequer; first, in the case of *Chappell v. Purday* (1), and again in the case, more exactly resembling the present, of *Boosey v. Purday* (2). Each of these cases was fully argued, and the deliberate and unanimous judgment of the Court was delivered by myself. I have discovered no reason and have heard no argument that induces me to alter the judgment pronounced in the latter case; and after the opinions that have been already delivered, examining the various cases, I do not think it is necessary to do more than refer to the judgment already pronounced by the Court to which I belong, in the case of *Boosey v. Purday*, for the grounds on which my opinion is still in accordance *with that judgment as far as the decided cases are concerned.

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In the judgment of the Court below, an opinion is expressed that in the statutes on copyright, the word "author," includes a foreign author resident abroad; but, with all respect for the argument

(1) 69 R. R. 698 (14 M. & W. 303).

(2) 80 R. R. 495 (4 Ex. 145).

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This view of the subject necessarily leads to the answers I have given to your Lordships' second, third, fourth, fifth, and sixth questions. I think the varied circumstances suggested in those questions would not have made any difference, because I think the statute did not give to Bellini any right or interest which could be conveyed or assigned to Ricordi. But I think it respectful to your Lordships' questions to give some further answer to them. In answer to the second question, I think if Bellini had, with reference to the laws of this country, any right, interest, or property to assign, an assignment valid by the laws of Milan, would have been sufficient, inasmuch as "copyright" is expressly enacted to be "personal property," and would therefore pass according to the laws of Milan, where the transfer took place. In answer to the

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LORD CHIEF JUSTICE JERVIS:

My Lords,—Before I answer the question proposed by your Lordships, I wish to consider the record and the points which arise upon it, because it involves several technical considerations, some of which also appear upon your Lordships' questions, which might determine this writ of error, without pronouncing an opinion upon the main subject.

The party who excepts to the ruling of a learned Judge must show clearly, upon his bill, that the learned Judge was wrong. Every fair intendment must be made in favour of the summing-up, and if, therefore, it is not apparent upon the record that the direction was wrong, the verdict must stand.

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evidence, and, for the reasons which I shall give hereafter, I think that such *primâ facie* title is rebutted by the other evidence set out upon the record.

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The second point is likewise of a technical nature, and is involved also in the first and some other of your Lordships' questions. The bill of exceptions states that, by the law of Milan, Bellini was entitled to copyright in his book, and to assign the same, and that he did, by an instrument in writing, signed and executed by him according to the law of Milan, assign the said copyright to Ricordi. Construing this allegation by the rules applicable to bills of exceptions, there can be no doubt that the words "said copyright," refer to the copyright before mentioned; viz., the copyright to which Bellini was entitled by the law of Milan; and as by the law of Milan Bellini could have no copyright elsewhere, it follows that even if Bellini had, by the law of England, a copyright in England, it did not pass by this assignment to Ricordi. This point, in my judgment, is decisive of the writ of error; but, inasmuch as the parties have, not improbably, stated the assignment in this form by mistake, and your Lordships desire the opinion of the Judges upon other questions, I proceed to consider the principal subject.

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Before doing so, however, there is another point, of a somewhat technical character, arising upon the bill of exceptions, and forming the subject of your Lordships' second question, which may here conveniently be disposed of. It does not appear upon the bill of exceptions that the assignment by Bellini to Ricordi, at Milan, was attested by two witnesses; on the contrary, as every fair intendment must be made against the party who excepts to the summing-up, it must be taken after verdict that the assignment was not so attested. Upon this subject I have entertained some doubts, but upon consideration am of opinion that two witnesses were not necessary. I do not adopt the argument at the Bar, that, being personal property, copyright would pass by a mode of transfer legal *in the country where the proprietor was domiciled, because, although that is the general rule with respect to personal property, it is subject to an exception where the personal property, as in this case English copyright, has a locality in a country which prescribes a particular form in which alone it can pass. My opinion is formed upon the difference which will be found in the wording of the statutes 8 Anne, c. 19, and 54 Geo. III. c. 156 (1). If the case was governed by the statute of Anne, I should think it clear that two witnesses

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were necessary, because an English copyright having a locality in England, and passing only in the form prescribed by the law of England, the cases cited at the Bar, *Power v. Walker* (1), *Davidson v. Bohn* (2), would be expressly in point. But, in my opinion, the law has been altered in this respect by the statute 54 Geo. III. c. 156 (3). This statute does not repeal the statute of Anne; it does not say that two witnesses shall not be necessary, but merely enacts that all booksellers and others who print and publish without the consent in writing of the proprietor, shall be liable to an action. A printer and publisher, therefore, who has the consent in writing of the proprietor, is not within this Act, or liable to an action. In this respect it is inconsistent with the statute of Anne, and, as I think, repeals it by implication. It is true that such provision does not expressly refer to an assignment of copyright, but neither does the statute of Anne, upon which reliance is placed. The cases referred to determined that as the statute of Anne required two witnesses for a simple licence, an absolute transfer of the author's whole interest must be made with the same solemnity; and the same reasoning, applied to the statute of Geo. III., leads me to the conclusion that if a licence in writing, unattested by witnesses, is sufficient to save a *printer and publisher from an action, an assignment of a copyright may be made in the same form.

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I come now to the main question, which is one of considerable difficulty and great importance: Has an alien resident abroad copyright in England? If he has, it must be by the common law or by statute, and upon each of these questions I will say a few words.

It will be convenient, however, before I do this, to understand clearly what is meant by the word "copyright," for much confusion has prevailed, during the argument at your Lordships' Bar, from a misapplication of this term. *Mr. Bovill* contends that the owner of a book or a manuscript has the same right as the owner of a chair or other personal chattel; he may keep it exclusively for his own use; he may give it or lend it to another, with a stipulation that it shall not be copied; and he argues that because these rights may be enforced in this country by a foreigner resident abroad, a foreign author is therefore entitled to copyright. But this meaning of the word "copyright," viz., the right to the

(1) 15 R. R. 378 (3 M. & S. 7).
(2) 6 C. B. 456.

(3) Repealed, 5 & 6 Vict. c. 45, s. 1.

individual copy, has no application to the subject under discussion. Copyright here means, the exclusive right of multiplying copies, which right does not attach to personal chattels; for although the owner of valuable inventions might at common law, and still may, under certain limitations, obtain the exclusive privilege of making them for public use, that right of monopoly springs from the prerogative of the Crown, and is not incident to the property itself.

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It is not necessary to decide in this case whether a British author had copyright at common law. Upon this subject there has been much difference of opinion amongst the greatest authorities; and I find from the judgment of Lord CAMPBELL, in the Court of Exchequer Chamber, that if it had been necessary, his Lordship, and the Judges *before whom that case was then argued, were strongly inclined to agree with Lord MANSFIELD, and the great majority of Judges, who in *Millar v. Taylor*, and *Donaldson v. Beckett*, declared themselves to be in favour of the common law right of authors. It is with extreme diffidence, therefore, that I express an opinion upon the subject, and declare that, in my judgment, a British author has not copyright at common law. I see nothing to distinguish the case of the author, as owner, of a book or manuscript from that of the inventor or owner of a complicated and highly useful machine. Each is the result probably of great talents, profound study, much labour, and it may be, of great expense; but as the inventor of the steam engine would, at the common law, have had no exclusive privilege of multiplying copies of his machine for sale, I see no reason, from the peculiar nature of the property, why the author of a treatise to explain the action of the steam engine should have at the common law an exclusive right of multiplying copies of his work. Since the case of *Millar v. Taylor*, and *Donaldson v. Beckett*, Lord KENYON has expressed a decided opinion, that no such right existed: *Beckford v. Hood* (1). Lord ELLENBOROUGH has inclined to the same view, *Cambridge University v. Bryer* (2); and a majority of the American Judges, in *Wheaton v. Peters* (3), arrived at the same conclusion. But I agree with the Judges of the Exchequer Chamber, that it is not here necessary to decide that question; indeed, the plaintiff's title was not put during the argument upon the common law right, except in so far as I have already referred

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(1) 4 R. R. 527 (7 T. R. 620).

(2) 16 East, 317.

(3) 8 Peters' Rep., Supr. Ct. U. S.

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to that argument; and it is clear that, even if by the common law a British author has copyright in this country, a foreign author resident abroad would not have it. The law of *Milan, where Bellini resides, would not confer it, and the common law of England would be confined to British authors, or to authors resident in England, and within the protection of the law of this country.

Is, then, the right conferred upon a foreigner, resident abroad, by the statute law of this country? In my opinion, it is not. The question turns upon the true construction of the statute 8 Anne, c. 19 (1), for the statute 54 Geo. III. c. 156 (1), merely extends the term "copyright," without containing any provision applicable to this subject. In the construction of this statute we must not be influenced by questions of policy. Our duty is to expound the law to the best of our ability, and we must endeavour, if possible, to arrive at the intention of the legislators who passed the statute in the reign of Queen Anne. Statutes must be understood in general to apply to those only who owe obedience to the laws, and whose interests it is the duty of the Legislature to protect. Natural-born subjects, and persons domiciled or resident within the kingdom, owe obedience to the laws of the kingdom, and are within the benefits conferred by the Legislature; but no duty can be imposed upon aliens resident abroad, and with them the Legislature of this country has no concern, either to protect their interests or to control their rights.

But it is said that this Act itself shows that it was intended to apply to all authors, foreign or British, wheresoever resident. A careful consideration of this statute leads me to a different conclusion. It is an "Act for the Encouragement of Learning by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies." Authors are to be encouraged, by enabling them to obtain from their publishers a larger remuneration, because, their publishers having the exclusive right of multiplying copies, can obtain from the public a larger price *for each copy of the work. To this extent the public are injured, that the author may be rewarded. In the case of British authors, the avowed object of this Act, the encouragement of learning may be worth the price which the public pay for it, and the Legislature may well be justified in such an enactment. But is it so with respect to foreign authors resident abroad? By the law of Milan, Bellini has that

which, by the law of his own country, is deemed a sufficient encouragement for the advancement of learning. He has copyright in that country, and although it is true that an author would obtain more for his work if, by a simultaneous publication in every country in Europe, he could obtain a copyright in each country, such a state of things could not have entered into the contemplation of those who passed this Act. The object was the advancement of learning; and although I can understand why the privilege of copyright might have been given to foreign authors resident abroad, if their works, when once published abroad, could not have been imported into and published in this country, without their consent, I can see no reason why, having, what is deemed by their own country a sufficient encouragement for the publication of their works there, they should also be encouraged to publish in this country, for the mere purpose of giving them an additional reward at the expense of the reading public. I think, therefore, that the statute is confined to British authors; meaning, by that expression, natural-born subjects of the realm, and those who, by domicile, residence, or possibly by personal presence only, are under the dominion of and subject to the laws of England.

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This latter consideration gives rise to an argument upon which much reliance was placed in the judgment of the Court below, where it was asked, why, if a foreigner may acquire the right by coming to England, may he not have *it whilst resident abroad; and why need he come from Calais to Dover, and not send his manuscript to his publisher at once, without that trouble? The answer, in my opinion, is, that whilst he is out of the realm he is not subject nor entitled to the benefits of the laws of the kingdom. It may be that by taking upon himself a liability to obey the laws, even by a temporary presence in this country, he also acquires the rights which the same laws confer; but it by no means follows that he would have the same right whilst residing abroad, without taking upon himself the corresponding duty. It has been further urged that copyright is analogous to patent right, and that the same construction should be put upon the several statutes applicable to each. I have already explained that at common law monopolies spring from the prerogative, and had no origin in the property protected. As guardian of the public interest, the Crown might legally, at common law, have granted monopolies for many purposes, and there is no doubt that it did so protect and foster the woollen manufacturers at Norwich, Ipswich, Wales, and elsewhere, who, though foreigners,

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introduced from a foreign country a new manufacture into this realm. Subsequently, when this prerogative, being abused, was controlled and defined by the statute 21 James I. c. 3, the words used were new manufactures within the realm, and true and first inventor of such manufacture, and the Courts, having reference to the common law, held that these words authorised the granting of a patent for an invention known abroad, but introduced as a new manufacture into this country. The distinction between the case of a patent and a copyright is this: In the former, at common law, the Crown might if it pleased, grant a monopoly for a manufacture new in this country, but in full operation abroad; and the statute of James saved to the Crown the power of *granting monopolies for a limited period in respect of new manufactures within the realm, meaning, of course, the same kind of manufactures as were the subject of monopolies at common law; whereas there was certainly no copyright at common law for foreign authors, and the statute of Anne had nothing upon which it could attach to give to the words used a larger meaning than they naturally import.

It remains only for me to examine the cases which bear upon the subject, for if I had found a current of decisions one way, I should have deferred to them, and have felt myself bound by their authority. *Tonson v. Collins* (1) is the first case upon the subject. In that case Lord THURLOW, then at the Bar, said, during the argument, that the right of property, copyright, if any, was personal, and might be acquired by aliens: but the property pirated in that case was the *Spectator*, the composition of natural-born subjects resident in England, and the observation amounts only, at most, to an assertion by counsel, that if an author resident in England composes a work, it is immaterial whether he is an alien or a British subject. *Bach v. Longman* (2) is the next case in order of time, and this is said to be an authority, because Baron WOOD, then at the Bar, did not object that the plaintiff was a foreigner. The only matter to be there determined was, whether a musical composition was a book within the statute, and the point, therefore, could not arise, even if it had been clear that Bach was a foreigner, or if a foreigner, was not resident in this country when he published his work. *D'Almaine v. Boosey* (3), was decided by Lord ABINGER, avowedly under the authority of *Bach v. Longman*, which, for the moment, was supposed to have determined that a foreigner resident *abroad had copyright in

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(1) 1 Sir W. Bl. 301—321.

(2) Cowp. 623.

(3) 41 R. R. 273 (1 Y. & C. 288).

this country; but that case, when examined, establishes no such thing, and the authority upon which it proceeded failing, the case of *D'Almaine v. Boosey* cannot now be considered as conclusive upon the subject. In the two cases referred to before Vice-Chancellor SHADWELL, he seems to have been of opinion both ways. In *De Londre v. Shaw* (1), he is reported to have said that the Court would not protect the copyright of foreigners and in *Bentley v. Forster* (2), he directed an action to try the right. *Clementi v. Walker* (3), so far as it goes, is an authority for the plaintiff in error. The point decided there was, that a prior publication in France destroyed any copyright which a foreigner, coming to this country, might have here; but the Court intimated an opinion that the statute of Anne was passed for the advancement of British learning.

Such was the state of the authorities when this great question was for the first time pointedly raised in the case of *Chappell v. Purday* (4). The Court of Exchequer in that case held, under circumstances like the present, that a foreigner resident abroad had no copyright, for that the statute of Anne was confined to British authors. The Court of Common Pleas, in *Cocks v. Purday* (5), took a different view of the same subject; and in *Boosey v. Davidson* (6), the Court of Queen's Bench followed the case of *Cocks v. Purday* without making any observations upon the subject. It was supposed at the time when *Boosey v. Davidson* was decided, that there had been a difference of opinion amongst the learned Judges who heard it, and that the Court had for that reason followed the last case without comment, leaving the question to be determined by a *court of error. But I find by Lord CAMPBELL's judgment that such was not the case; he was informed by his colleagues that the decision in *Cocks v. Purday* was not only followed, but was fully considered and entirely approved of by Lord DENMAN and all his brethren. That case must therefore be treated as a deliberate and well-considered decision upon the subject. In the last case, *Boosey v. Purday*, the Judges of the Exchequer adhered to their former judgment. In truth, therefore, there are but four cases which bear directly upon the subject; one in the Common Pleas, and one in the Queen's Bench, in favour of the defendant in error, and two in the Exchequer in favour of the plaintiff in error. The learned Judge who tried this cause adopted the view of the Court of Exchequer,

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(1) 2 Sim. 237.

(2) 10 Sim. 329.

(3) 26 R. R. 569 (2 B. & C. 861).

(4) 69 R. R. 698 (14 M. & W. 303).

(5) 5 C. B. 860.

(6) 13 Q. B. 257.

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and it cannot be said, in this state of the authorities, that he was bound by express decisions to take a different view.

With this preface, I proceed to answer your Lordships' questions.

I answer the first question in the negative, because the question assumes that Bellini only assigned to Ricordi the copyright which Bellini had by the law of Milan ; and further, because Bellini had, under the circumstances stated, no copyright in England which he could assign.

I answer the second question in the negative, because, first, in my opinion, two witnesses would not be required to attest the assignment of an English copyright, if Bellini had such a copyright to assign ; secondly, because Bellini did not profess to assign the English copyright if he had it ; and thirdly, because he had, in my opinion, no English copyright to assign.

I answer the third question in the negative, because, for the reasons which I have given, I am of opinion that Bellini had no English copyright which he could assign.

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I answer the fourth and fifth questions in the negative, because Bellini, under the circumstance, having no English copyright to assign, it is immaterial whether the work was published abroad before or after the assignment, and before the publication in this country. In *Clementi v. Walker* (1), it was decided that a prior publication abroad would prevent a foreign author resident in this country from having copyright here.

I answer the sixth question in the negative, under the particular circumstances of this case, because, in my opinion, Bellini had no English copyright to assign.

I answer the last question in the affirmative, because technically the assignment to Ricordi passed only the Milanese copyright, and because substantially Bellini had no English copyright to assign.

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THE LORD CHANCELLOR having stated very fully the nature of the action, and the evidence set forth in the bill of exceptions, said :

These being the facts deposed to, the question arose, whether they afforded evidence of the existence of any copyright in the defendant in error ? It may be assumed, that on the facts thus proved, the rights of Bellini, the author (if any), had been effectually transferred to Boosey, the defendant in error ; and thus the important question arose, whether Bellini had by our law a

copyright which he could transfer through Ricordi to Boosey, so as to entitle the latter to the protection of our laws?

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If the work, instead of having been composed by an alien resident abroad, had been composed by a British subject resident in England, there is no doubt but that his assignee would have acquired a copyright which our laws would *protect. The question, therefore, arising on this evidence (assuming the assignments, first to Ricordi, and then to Boosey, to have been effectually made), is whether Bellini ever had a copyright here? that is, whether an alien resident abroad, and there composing a literary work, is an author within the meaning of our copyright statutes? If he is not, then the direction which I gave at the trial was correct; for then it was proper to tell the jury that the evidence would not warrant a finding that Boosey was the proprietor of the alleged copyright, or that there was, in fact, in this country any subsisting copyright in the said work.

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The case was argued most ably at your Lordships' Bar in the presence of the learned Judges, ten of whom have since given us their opinions on the questions submitted to them. They have differed in the conclusions at which they have arrived; six of them being of opinion that Bellini had a copyright which was effectually transferred to the defendant in error, and four of them holding, on the other hand, that he had no such right. The majority, therefore, is of opinion that my direction at the trial was wrong, and so, that the Exchequer Chamber was right in awarding a *venire de novo*.

It is impossible, my Lords, to overrate the advantage which we have derived from the assistance of the learned Judges in helping us to come to a satisfactory decision on this important and difficult question. They have in truth exhausted the subject, and your Lordships have little else to do than to decide between the conflicting views presented to you by their most able opinions. I could have wished that, as my direction at the trial was the matter under review, I might escape from the duty of pronouncing an opinion in this case; but I have felt that I have no right to shrink from responsibility, and I have therefore given *the case my most anxious attention; and I now proceed to state, very shortly, why it is that I adhere to the opinion I expressed at the trial, and why I therefore think that the court of error was wrong in awarding a *venire de novo*.

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In the first place, then, it is proper to bear in mind that the

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right now in question, namely, the copyright claimed by the defendant in error, is not the right to publish, or to abstain from publishing a work not yet published at all, but the exclusive right of multiplying copies of a work already published, and first published by the defendant in error here in this country. Copyright thus defined, if not the creature, as I believe it to be, of our statute law, is now entirely regulated by it, and therefore in determining its limits we must look exclusively to the statutes on which it depends. The only statutes applicable to the present case are the statutes of 8 Anne, c. 19, and the 54 Geo. III. c. 156. Indeed, the first of these statutes is that to which alone we may confine our attention; for though the statute of George III. extends the term of protection, it does not alter the nature of the right, or enlarge the class of persons protected. Looking, then, to the statute of Anne, we see by the preamble that its object was the "encouragement of learned men to compose and write useful books;" and even if there had been no such preamble, the nature of the enactments would have sufficiently indicated their motive. With a view to attain this object, the statute enacts, that "The author of any book which shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book for the term of fourteen years, to commence from the day of the first publishing the same, and no longer." The substantial question is, Whether, under the term "author," we are to understand the Legislature as referring to British authors only, or to have contemplated all authors of every *nation. My opinion is, that the statute must be construed as referring to British authors only. *Primâ facie* the Legislature of this country must be taken to make laws for its own subjects exclusively, and where, as in the statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of her Majesty's subjects, the object of giving that privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community, for the general advantage of which the enactment is made. When I say that the Legislature must *primâ facie* be taken to legislate only for its own subjects, I must be taken to include under the word "subjects" all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute; he is within its words and

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spirit. I go further; I think that if a foreigner, having composed, but not having published a work abroad, were to come to this country, and, the week or day after his arrival, were to print and publish it here, he would be within the protection of the statute. This would be so if he had composed the work after his arrival in this country, and I do not think any question can be raised as to when and where he composed it. So long as a literary work remains unpublished at all, it has no existence, except in the mind of its author, or in the papers in which he, for his own convenience, may have embodied it. Copyright, defined to mean the exclusive right of multiplying copies, commences at the instant of publication; and if the author is at that time in England, and while here he first prints and publishes his work, he is, I apprehend, an author, within the meaning of the statute; even though he should have come here solely with a view to the *publication. The law does not require or permit any investigation on a subject which would obviously, for the most part, baffle all inquiry; namely, how far the actual composition of the work itself had, in the mind of its author, taken place here or abroad. If he comes here with his ideas already reduced into form in his own mind, still, if he first publishes after his arrival in this country, he must be treated as an author in this country. If publication, which is (so to say) the overt act establishing authorship, takes place here, the author is then a British author, wherever he may, in fact, have composed his work. But if at the time when copyright commences by publication, the foreign author is not in this country, he is not, in my opinion, a person whose interests the statute meant to protect.

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I do not forget the argument, that from this view of the law the apparent absurdity results, that a foreigner having composed a work at Calais, gains a British copyright if he crosses to Dover, and there first publishes it, whereas he would have no copyright if he should send it to an agent to publish for him. I own that this does not appear to me to involve any absurdity. It is only one among the thousand instances that happen, not only in law, but in all the daily occurrences of life, showing that whenever it is necessary to draw a line, cases bordering closely on either side of it are so near to each other, that it is difficult to imagine them as belonging to separate classes; and yet our reason tells us they are as completely distinct as if they were immeasurably removed from each other. The second which precedes midday is as completely distinct from that which follows, as the events which happened a hundred

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years ago are from those which are to occur in the next century. I do not, therefore, feel the force of the argument to which I have just adverted.

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On the other hand, great support for the opinion of those who think that the statute did not comprise foreign authors may be found in the exception, which those who take a different view are obliged to make, of the case of authors who have just published abroad. I do not see any satisfactory ground for such an exception, if we are to consider the statute as extending to foreigners at all. If the object of the enactment was to give, at the expense of British subjects, a premium to those who laboured, no matter where, in the cause of literature, I see no adequate reason for the exception, which it is admitted on all hands we must introduce, against those who not only compose, but first publish, abroad. If we are to read the statute as meaning by the word "author" to include "foreign authors living and composing abroad," why are we not to put a similar extended construction on the words "first published?" And yet no one contends for such an extended use of these latter words.

Some stress was laid on the supposed analogy between copyright and the right of a patentee for a new invention; but the distinction is obvious. The Crown, at common law, had, or assumed to have, a right of granting to any one, whether native or foreigner, a monopoly for any particular manufacture. This was claimed as a branch of the Royal prerogative, and all which the statute of 21 Jac. I. c. 8, sec. 6, did was to confine its exercise within certain prescribed limits; but it left the persons to whom it might extend untouched. The analogy, if pursued to its full extent, would tend to show that first publication abroad ought not to interfere with an author's right in this country. For certainly it is no objection to a patent that the subject of it has been in public use in a foreign country. I am aware that the statute of James, in reserving to the Crown the power of granting to inventors the exclusive right of *making new manufacturers for fourteen years, has the words "within this realm;" but these same words are implied, though not expressed, in the statute of Anne, and I cannot, therefore, feel any force in the argument derived from this statute.

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My opinion is founded on the general doctrine, that a British statute must *primâ facie* be understood to legislate for British subjects only, and that there are no special circumstances in the

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statute of Anne, relating to authors, leading to the notion that a more extended range was meant to be given to its enactments.

It remains, however, to look to the authorities; for certainly if I had found any long uniform current of decisions in favour of the view taken by the court of error, I should readily yield to them, whatever might be my opinion of their original soundness; but I find nothing of the sort. Indeed, I agree with the observation of Mr. Baron ALDERSON, that it is wonderful how little in the nature of authority we have to guide us.

The earliest case to which we are referred was *Tonson v. Collins* (1); but this was hardly relied on seriously; it proves no more than this, that Lord THURLOW, when at the Bar, in arguing a case of copyright, treated natural-born subjects and aliens as standing on the same footing, when it might, perhaps, have been to the interest of his client that he should have argued differently. This must, I think, be wholly disregarded.

We may also disregard the various cases in which questions have arisen as to the rights of a foreigner resident in this country and first publishing his work here; they have no bearing on the point now under discussion, as the right of such persons is not disputed. *Bach v. Longman* (2), in Lord MANSFIELD's time, may be placed in this class. In truth, until very recently, there have been no cases bearing directly on the point.

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In *Delondre v. Shaw* (3), before the late Vice-Chancellor of England, we find that learned Judge stating, extra-judicially, that the Court of Chancery does not interfere to protect the copyright of a foreigner. That *dictum* was uttered in 1828; and, four years later, the same learned Judge held, in *Page v. Townsend* (4), what indeed could hardly have been doubted, that engravings designed and sketched abroad, though imported and first published here, were not entitled to the protection of our statutes.

The next case was that of *D'Almaine v. Boosey* (5), in 1835, in which Lord ABINGER disputed the correctness of what had been said *obiter* by Vice-Chancellor SHADWELL, in *Delondre v. Shaw*, and granted an injunction in favour of a foreign composer, or, rather, the assignee of his right.

In 1839 the point again came before the Vice-Chancellor SHADWELL, in *Bentley v. Foster* (6), when he expressed his opinion to be in favour

(1) 1 Sir W. Bl. 301, 321.

(2) Cowp. 623.

(3) 2 Sim. 237, 240.

(4) 35 R. R. 174 (5 Sim. 395).

(5) 41 R. R. 273 (1 Y. & C. 288).

(6) 10 Sim. 330.

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of the foreigner's copyright, but he would not decide the point without a previous trial at law.

Then occurred, two years later, the case of *Chappell v. Purday* (1), before Lord Abinger, sitting in equity; when, though he adhered to the opinion he had expressed in favour of the foreigner's right, yet he declined to act in the particular case, on account of special circumstances.

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Since Lord Abinger's time, the question has been brought before all the courts of common law, and their judgments have been conflicting. The Court of Queen's Bench, in the case of *Boosey v. Davidson* (2), and the Court of Common *Pleas, in that of *Cocks v. Purday* (3), have decided in favour of the foreigner's right. On the other hand, the Court of Exchequer, in *Chappell v. Purday* (4), and afterwards in *Boosey v. Purday* (5), took a different view of the law, and held that the statutes do not extend to foreigners. I do not go into the particular facts of those cases; they are fully commented on in the very able opinions of the Judges. I consider it quite sufficient to say that these cases seem to me only to show that the minds of the ablest men differ on the subject. There is nearly an equal array of authorities, all very modern, on the one side and on the other. It can only be for this House to cut the knot.

I have already stated, shortly, my grounds for concurring with the four Judges who are in the minority. Being thus of opinion that no English copyright ever existed in this work, I have not thought it necessary to go into the minor and subordinate inquiries on which it might have been necessary to come to a conclusion, if my view on the greater question had been different; and I now, therefore, merely move your Lordships that the judgment below be reversed, and that judgment be given for the plaintiff in error.

LORD BROUGHAM :

My Lords,—I must begin by stating how entirely I agree in what my noble and learned friend has observed as to the great ability and learning with which this case was argued at the Bar on both sides, and the great assistance which we have derived from the answers which have been given to our questions by the learned Judges.

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In coming to a decision on this case, it is not necessary to assume

(1) 4 Y. & C. 485.

(4) 69 R. R. 698 (14 M. & W. 303).

(2) 13 Q. B. 257.

(5) 80 R. R. 495 (4 Ex. 145).

(3) 5 C. B. 860.

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that the much-vexed question of common-law right to literary property has been disposed of either way. Yet as a strong inclination of opinion has been manifested upon it, as that leaning seems to pervade and influence some of the reasons of the learned Judges, and as the determination of it throws a useful light upon the subject now before us, I am unwilling to shrink from expressing my own opinion on the question, the more especially as I am aware that it does not coincide with the impressions which generally prevail, at least, out of the profession.

The difference of opinion among the learned Judges on the various points of the present case are not greater than existed when *Donaldson v. Beckett* (1) was decided here in 1774, and when, in 1769, in the case of *Millar v. Taylor* (2), the Judges of the Court of King's Bench had been divided in opinion for the first time since Lord MANSFIELD presided in that Court. In this House they were, if we reckon Lord MANSFIELD, equally divided upon the main question, whether or not the action at common law is taken away by the statute, supposing it to have been competent before; and they were divided, as 9 (or with Lord MANSFIELD 10) to 8, and as 8 to 4, upon the two questions touching the previously existing common-law right. This House, however, reversed the decree under appeal, in accordance with the opinion given on the main point by the majority of the Judges; and upon the general question of literary property at common law no judgment whatever was pronounced.

In this diversity of opinion, it asks no great hardihood to maintain a doctrine opposed to that of the majority of those high authorities, considering the great names which are to be found on either side; but it must be admitted *that they who, both on that memorable occasion and more recently, have supported the common-law right, appear to rely upon somewhat speculative, perhaps enthusiastic, views, and to be led away from strict, and especially from legal, reasoning into rather declamatory courses. Some reference also seems to have been occasionally made to views of expediency or of public policy, to the conduct of foreign States, and the possible effects produced upon it by a regard to the arrangements of our municipal law. All such considerations must be entirely discarded, even as topics, from the present discussion, which is one purely judicial, and to be conducted without the least regard to any but strictly legal arguments.

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(1) 4 Burr. 2408 ; 2 Br. P. C. 129.

(2) 4 Burr. 2303.

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The right of the author before publication we may take to be unquestioned, and we may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript; he may withhold, or he may communicate it, and, communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation. But if he makes his composition public, can he retain the exclusive right which he had before? Is he entitled to prevent all from using his manuscript by multiplying copies, and to confine this use of it to those whom he specially allows so to do? Has he such a property in his composition as extends universally and enures perpetually, the property continuing in him wheresoever and whensoever that composition may be found to exist? In other words, can his thoughts, or the results of his mental labour, or the produce of his genius, be considered as something fixed and defined, which belongs to him exclusively at all times and in all places?

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First, let us observe that this question cannot be confined to the form, whether written or printed, which that composition takes, or in which these thoughts are conveyed. If it is clear that before publication the author has the right, and may proceed against those to whom he imparts his manuscript under conditions, it is equally clear that if he had communicated his composition to them verbally under such conditions, he could have complained of a breach. The question is personal between him and them. But if instead of orally delivering his composition to a select number, he delivered it to all who came and heard him, imposing no restriction, he could not complain with effect of any one repeating it to others who had not been present. Now, there seems no possibility of holding that he can prevent the persons to whom he gave or sold his paper, whether written or printed, from making their own use of it, without also holding that he could proceed against his auditors unwarned. If each of these might repeat what he had heard, each of those might lend the paper or book, and could only be tied up from so doing by express stipulation, imposing restrictions upon him when he received it. So, if he could lend it, he could copy it and give or sell his copy unless so tied up. It is another thing to maintain that no such restriction could be imposed, *per expressum*. If each copy, furnished by the author, bears with it a stipulation on his part, a correlative obligation may

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rest on the receiver, restraining him from any but the restricted use of the composition. But the doctrine of copyright, after publication, assumes that there exists by force of law an implied notice to all the world against using the book or paper, except in one way, namely, reading it.

Again, this right, if it is of a proprietary nature, is not only in the author, but it is transferable by assignment, *and he may prevent all using the copies he has sold without leave of his assigns ; that is, he may vest in his assigns the power of preventing any one, without their leave, from reading the composition. By parity of reasoning, if he recites it, he may forbid any hearer to repeat it, without leave of some one authorised by him, although no condition had been imposed upon those who entered the place of recitation to listen ; and if any such auditor, unknown to the author, or his licensee, has repeated it, the author or his licensee, or assignee, may proceed against the party to whom that rehearsal has been made, in case he repeats without leave what he has been told by the first hearer. This consequence, if not wholly absurd, yet assuredly somewhat startling, follows from the title alleged.

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Furthermore, the author's right of exclusion is not confined to his own life, if it is, or even if it resembles, a right connected with property. It must be descendable and devisable as well as assignable. If Milton's deathless verse had been recited, or Newton's immortal discoveries had been revealed in some learned conference, the right to let others hear them would have been confined to licensed persons, not indeed during the existence of the globe, which those prodigious works enlightened, and were fated to endure while it lasted, but as long as the Statute of Limitations and the law of perpetuities allowed.

It is not to be supposed that the analogy of incorporeal hereditaments affords countenance to the doctrine. These are connected with, or rather they are parcel of, corporeal rights ; they rest upon a substantial, a physical basis ; rather they are the uses of something material. A rent is something issuing out of land ; a way, the use of the land's surface. The enjoyment of the rent or of the way is only an incident, a fruit, or consequence of the possession. The composition, and the repetition or copying of it, *cannot be so distinguished and kept apart. There is nothing in the thought of the person resembling the substance to which the incorporeal hereditament is related. They are of too unsubstantial, too evanescent a nature, their expression of language, in whatever manner, is too fleeting, to be

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the subject of proprietary rights. *Volat irrevocable verbum*, whether borne on the wings of the wind or the press, and the supposed owner instantly loses all control over them. When the period is demanded at which the property vests, we are generally referred to the moment of publication. But that is the moment when the hold of the proprietor ceases. He has produced the thought and given it utterance, and, *eo instanti*, it escapes his grasp.

Thus, whatever may have been the original right of the author, the publication appears to be of necessity an abandonment; as long as he kept the composition to himself, or to a select few placed under conditions, he was like the owner of a private road; none but himself or those he permitted could use it; but when he made the work public, he resembled that owner after he had abandoned it, who could not directly prohibit passengers, or exact from them a consideration for the use of it.

It seems a further argument against the right, that property in one person essentially implies absolute exclusion of all others. A property which by possibility, however remote, may belong just as entirely to one as to another, stands, it must be admitted, in a most anomalous position. The case has sometimes been put of two persons falling upon the very same words. In a translation this is not so improbable; and we must remember both that translation falls within the rule as well as original composition, and also that any writing, however short, stands in the same position with the longest. Now it is very possible indeed *that two persons should translate a few lines in the self-same words. Here there is an instance where the self-same thing would belong exclusively to each, which is absurd.

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Some have relied on the case of inventions, but, as appears to me, without due reflection, when used upon that side of the argument; for this reference seems an exceedingly strong argument against the supposed right, and an argument from which its advocates cannot escape, as some of them have attempted, by urging that the two cases stand on different grounds. I hold that they stand in one material respect on the same ground. Whatever can be urged for property in a composition, must be applicable to property in an invention or discovery. It is the subject-matter of the composition, not the mere writing, the mere collection of words, that constitutes the work. It may describe an invention, as well as contain a narrative or a poem, and the right to the exclusive property in the invention, the title to prevent any one from describing

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it to others, or using it himself (before it is reduced to writing) without the inventor's leave, is precisely the same with the right of the author to exclude all men from the multiplication of his work. But in what manner has this ever been done or attempted to be done by inventors? Never by asserting a property at common law in the inventor, but by obtaining a grant from the Crown. The King had illegally assumed the right of granting such monopolies in many things, until the abuse was corrected by the 21 James I. c. 8, which, as Lord Coke says, (8 Institutes, 181) is a judgment in Parliament, that such grants were against the ancient and fundamental laws, and he considers them (2 Institutes, 47—63) to be against Magna Charta. The statute, however, by its well-known proviso, section 6, allowed such exclusive privileges to be granted for a limited *time to inventors, and it is only under the Crown grants permitted by this proviso that they have ever had the privilege. Monopolies had been given to authors and publishers of books while the abuse continued, both in the reign of Elizabeth and of her immediate predecessors; but no saving clause for these was introduced in the statute of James. On the contrary, the 10th section provides that these as well as some other grants shall not be affected either by the prohibition or by the proviso.

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It is said that literary and scientific men are left without protection, and that the invaluable produce of their labours is unduly estimated by the common law, if the right in question be not recognised. But the negation of that right only implies that we refuse to acknowledge a property in things by their nature incapable of being held in severalty, and that we recoil from adopting a position which involves contradiction. The contradiction is, that one can retain that which he parts with, and can dedicate to the public, or at least do an act which necessarily involves such dedication, and yet keep exclusive possession of the thing dedicated, and retain all the rights he had before the dedication.

But although the inability to hold these contradictory positions precludes, to a great degree, the common law encouragement of letters and science, their cultivators are not without resource; for while the nature of the thing and the incidents of its production prevent it from being the subject of property at common law, the lawgiver can make it a *quasi* property, or give the author the same kind of right and the same remedies which he would have if the produce of his labour could have been regarded as property, and so it is in other cases. A remarkable instance at once presents itself

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where the interposition of the positive law is as much to be lamented and condemned *as in the case of letters and science it is to be gratefully extolled. By all rules, by the nature of the subject, by the principles of morality, by the sanction of religion, there can be no property in human beings; the common law rejects, condemns, and abhors it. But such a power has been established by human laws, if we may so call those acts of legislative violence which outrage humanity, and usurp, while they profane, the sacred name of law. That which was before incapable of being dealt with as property by the common law, became clothed by the lawgiver's acts with the qualities of property; and thus the same authority of the lawgiver, but exercised righteously and wisely for a legitimate and beneficent purpose, gave to the produce of literary labour that protection which the common law refused it, ignorant of its existence; and this protection is, therefore, in my opinion, the mere creature of legislative enactment.

That the weight of authority is in favour of this position I hold to be clear. The very able argument of Mr. Justice YATES, in *Millar v. Taylor* (1), may fairly be set against that of the two Judges, Mr. Justice WILLES and Mr. Justice ASTON, who agreed in the opposite opinion; and I entirely concur with the objection taken by the LORD CHIEF BARON in the present case to the argument of Mr. Justice WILLES. Lord MANSFIELD gives, no doubt, an unhesitating opinion, with the grounds of it; but he rather relies on the argument of the two puisne Judges, who differed from Mr. Justice YATES, than enters very fully into the discussion himself.

[*969] In 1798 we have a very decided opinion, to this effect, of Lord KENYON in *Beckford v. Hood* (2), who also says that the doctrine "finally prevailed" against that maintained by some of the Judges in *Donaldson v. Beckett*, that *authors and their assigns had a right independent of statute. Mr. Justice ASHHURST, who had been one of those Judges, does not in that case (*Beckford v. Hood*) re-affirm his former opinion.

In a case which I argued in 1812, in the Court of King's Bench, Lord ELLENBOROUGH's opinion leant to the same side, although he did not consider it necessary to express it decidedly, the case not requiring it. I refer to the case of *The Cambridge University v. Bryer* (3).

But I also consider the statute of Anne itself as plainly indicating

(1) 4 Burr. 2354.

(2) 4 R. R. 527 (7 T. R. 620).

(3) 16 East, 317.

the opinion of the Legislature that there was no copyright at common law. This appears throughout its whole provisions, and manifestly from this, that its purpose being as stated in the preamble "to encourage learned men to compose and write useful books," it vests in the authors and their assignees the exclusive right of printing for twenty-one years, and no longer, from the 10th of the following April, in certain cases, and in others fourteen years from the date of the publication. Surely if authors and their assigns had possessed the unrestricted right at common law, this restraint upon it could hardly have been deemed an encouragement, even coupled with the not very ample or stringent statutory remedies provided.

It being, therefore, in my judgment, unquestionable that the statutes alone confer the exclusive right, can it be contended that the Legislature had in contemplation to vest the right in any but its subjects, and those claiming through them? These statutes, or rather the statute of 8 Anne, c. 19 (1) (for the 54 Geo. III. c. 156 (1), does not alter it, except by extending the period of the monopoly) in no way affects the class of persons to enjoy it, as my noble and learned friend has justly observed. We are, *therefore, required to rely solely upon the statute. The encouragement of learning, by encouraging learned men to write useful books, is declared to be the object of the statute, and that object it pursues by giving the author and his assigns a monopoly for a limited period. The Legislature gives this encouragement at the expense of its own subjects, to whom the monopoly raises the price of books. Generally, we must assume that the Legislature confines its enactments to its own subjects, over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases, and may, without express words, make it appear that such is the intendment of those provisions. But the presumption is rather against the extension, and the proof of it is rather upon those who would maintain such to be the meaning of the enactments.

It can hardly be contended that, a century and a half ago, the Parliament was minded to encourage learning at home, by encouraging foreigners to write books at the expense of the British purchaser; that a monopoly in our market was to be established for the sake of foreign writers, who might thus be induced to write, and thereby benefit our people. We cannot say that foreign authors were wholly out of the contemplation of the Act, that their case was *casus*

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(1) Repealed, 5 & 6 Vict. c. 45, s. 1.

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omissus. There is express provision made for the importation of books in Greek, Latin, or any foreign language, notwithstanding the prohibitory enactments. It was therefore assumed that foreigners would publish abroad, and that their works might be brought over. That the price of all works in the British market was a subject of care to the framers of the Act is manifest, because provision is made for preventing an undue price of books by the power given in the 4th section to *certain authorities to fix their price; which absurd provision, as is well known, was repealed 30 years afterwards, by 12 Geo. II. c. 36. This provision was taken from an Act of the 25 Hen. VIII. c. 15, sec. 4, repealing the permission given by 1 Rich. III. c. 9, sec. 12, to import printed books, and repealing it in order to protect the printers and binders, who had, during the half century that intervened since the Act of Richard III., become a considerable craft. While giving native industry this protection, it pleased the Legislature to impose the restriction upon the price of books by conferring upon certain high functionaries the power of fixing it. And two centuries and more had not found the Legislature more rational, for the statute of Anne adopted a similar provision. But absurd as we all must now admit that provision to have been, it at least showed the strong disposition of the Legislature, not only in Henry VIII.'s time, but in Queen Anne's time, to protect the British purchasers against high prices. Yet the contention that learning and learned men are to be encouraged by giving foreign authors a monopoly at the expense of British purchasers, proceeds upon the assumption that there was no care for their interests. And if it be said that the consideration of cheapness was to be sacrificed to the wish for the encouraging of foreign writers, whereby the British purchaser might gain more than he lost in the price, the answer is, that the very same consideration would have prevented the attempt at keeping down the price of books published under the Act, because their authors, being thus encouraged to write, the purchaser gained, in so far, though he lost in the cheapness of the books. But in truth no one can read the provision touching prices without drawing a further inference from it, that very crude and narrow principles then prevailed on these subjects; and we could hardly expect that the same Legislature *which appointed an authority with stringent liberal powers to keep down prices would entertain such large and enlightened views as it must have had, if it encouraged foreigners, at the temporary and immediate cost, at

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all events, of its own subjects, for the sake of multiplying generally the number of useful works, and so benefiting those subjects on the whole.

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Among a good deal of somewhat popular and declamatory matter, which is to be found in this case, may be mentioned that more plausible and more showy than solid objection taken, that the consequence of confining the statute to one territory will be to make a foreign author come over to Dover, in order to have the exclusive privilege; whereas, as has been adverted to by my noble and learned friend, if he stopped at Calais he could not have it. This is only one of the consequences, as my noble and learned friend justly observed, of any law which is bounded in its operation by extent of territory. We have abundant instances of such results, not only in civil but in criminal law, and sometimes in both civil and criminal law together, arising out of some diversity of jurisdiction. Married one foot on this side of the middle of a bridge between England and Scotland, the parties have been held by all the Judges guilty of felony, and their issue bastard; when had the nuptial contract been made a foot to the north, the marriage would have been lawful, and its issue legitimate. The English female owner of an estate or settlement, if she comes to Dover, and there lies in, produces issue inheritable, being English issue; if she had been taken in labour at Calais, the issue would have been alien, and could not have taken the estate. So of the consequences arising from limitations in point of time, which have been well adverted to by my noble and learned friend.

The authority of the decided cases which bear upon the *question before us, is of less moment than it otherwise would be, inasmuch as there is a conflict of decisions; and we may regard the whole of them to be now brought under our review for the ultimate settlement of the question by this House, which is not bound by the resolutions of the Courts below. So great respect, however, is due to those Courts, that it is fit that we should note what has passed there, before arriving at our final determination.

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First of all, we may lay out of view whatever has been said, either at the Bar or on the Bench, respecting the case of *Tonson v. Collins* (1), and the case of *Bach v. Longman* (2). The former amounts really to nothing; it resolves itself into the fact of the counsel, *Mr. Thurlow*, who argued it, having observed that the right, if any, might be acquired by aliens; the special verdict having

(1) 1 Sir W. Bl. 301.

(2) Cowp. 623.

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The common law does give a man who has composed a work a right to that composition, just as he has a right to any other part of his personal property; but the question of the right of excluding all the world from copying, and of himself claiming the exclusive right of for ever copying his own composition, after he has published it to the world, is a totally different thing. But as to this question of common-law right, I do not intend to enter upon the argument, particularly after the very full discussion of it by my noble and learned friend who has just sat down; and indeed I cannot at all understand how that question can apply to this case. What possible right can Bellini, or any other person claiming under him, have at common law in this country to the exclusive right of publishing a composition made by Bellini abroad? If Bellini comes to this country, and owing even a temporary allegiance to the Sovereign, acquires the legal rights which belong to every subject, that of course one can understand; but what right in this country can exist in a foreigner, like Bellini, composing abroad, and residing abroad, but sending his composition here simply for publication? Where is the right? The common law cannot extend to a foreigner resident abroad, and owing no allegiance to this country. The claim of such a right is distinguishable from any case which has been cited, or which can be cited, which gives a right to a foreigner with regard to damage done to his character, for example, by a person resident in this country; the cases are altogether distinct. This is a right of property which is claimed within this realm, and that right of property cannot be claimed under the common law by a foreigner who owes no allegiance to this country, and who has never acquired any property or any other right, *in respect of residence here, or by Act of Parliament or otherwise, to make him a subject of this realm. I am therefore clearly of opinion that whatever may be the view which might be taken as to the common-law right, that right never can be held to extend to a foreigner situated as Bellini is.

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My Lords, the question then comes of course upon the statutes. I think we may fairly consider that it ought not to be denied that, speaking generally, an Act of our own Parliament, having a municipal operation, cannot be held to extend, *primâ facie*, beyond our own subjects. It is not that an Act of Parliament may not, like the common law itself, extend its benefits to foreigners who come here and acquire that which it has been the policy of this country to give them; namely, the rights in a great measure of

natural-born subjects. That is not the question, but the question is, Do these Acts of Parliament, or not, give to foreigners, *quà* foreigners, the right which is claimed by Ricordi, as claiming under Bellini, or by the plaintiff as claiming under Ricordi? That is the question. I venture to represent to your Lordships that it is quite clear, as an abstract proposition, that an Act of Parliament of this country having within its view a municipal operation, having, as in this particular case, a territorial operation, and being therefore limited to the kingdom, cannot be considered to provide for foreigners, except as both statute and common law do provide for foreigners when they become resident here, and owe at least a temporary allegiance to the Sovereign, and thereby acquire rights just as other persons do; not because they are foreigners, but because being here, they are here entitled, in so far as they do not break in upon certain rules, to the general benefit of the law for the protection of their property, in the same way as if they were natural-born subjects.

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Now, I will just draw your Lordships' attention to what had been the state of legislation about the very time that the Copyright Act of the 8 Anne was passed. In the 7th year of that Queen, we know that there was an Act passed for generally encouraging the settlement here of foreign Protestants: that Act recites that, "The increase of people is a means of advancing the wealth and strength of a nation; and whereas many strangers of the Protestant or Reformed religion, out of a due consideration of the happy constitution of the Government of this realm, would be induced to transport themselves and their estates into this kingdom, if they might be made partakers of the advantages and privileges which the natural-born subjects thereof do enjoy." Then, upon taking certain oaths, all foreign Protestants in this country were at once naturalised. We know that that was afterwards repealed, it being found not to answer the end which the Legislature had in view; but it shows that just before this Act of Parliament was passed which is now under discussion, the Parliament had held out a strong inducement to foreigners, being Protestants, to become as it were natural-born subjects, to come over to this country, as it is stated, with their wealth, and to add to that which was then considered to constitute the riches of a country, namely, the population of the country. It can easily be understood, therefore, that in any view which the Legislature would take of it, a course which was adopted was intended indirectly to benefit foreigners; but then they were to be foreigners resident here, the object being to attract Protestant

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foreigners to this country, and to give them certain benefits when they arrived here. And it is singular enough that in two different Acts of the very same year in which this Copyright Act passed, both Acts having for their object to raise funds for the prosecution of the war, there are express enactments, that natives *and foreigners may subscribe to the sums which are intended and proposed to be raised ; so that when the Acts of Parliament of that period intended to provide expressly for foreigners, care was taken to insert the words " natives and foreigners." Although that fact may not be entitled to very great weight, still it rather helps to guide us to a knowledge of what was the feeling of the time.

Then we come to the Act of Parliament itself. As regards the authorities, I need not add another word, after what has fallen from both my noble and learned friends, because, from the ample discussion which those cases have undergone by the learned Judges, with whose opinions the House has been favoured, and after the observations of my noble and learned friends, I think every one must arrive at this conclusion stated by one of the learned Judges, that this case, for the purpose of decision by your Lordships, is entirely uninfluenced by authority. It is impossible, looking at the whole of the authorities down to the cases which are now before this House for decision, to say that there is any authority which is entitled to any weight. We come, therefore, at once to the cases which are now under review, and upon which your Lordships are required at this time to decide the great and important question now before you.

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The statute of Anne is framed in very general words ; it is by no means scientifically framed ; and singularly enough, in the very statement of it, one would hardly suppose what its object was, for it states in the first place, that the object is to give to authors the right to copies. The Act is called " An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned." Of course the heading of an Act of Parliament does not at all affect its construction ; but *it is a singular heading, for it does not speak of the authorship, or the right to exclude others from multiplying copies ; but it speaks of vesting the copies in the authors. The truth is, that the copies, as copies, were vested in the authors, without the assistance of Parliament at all. Nobody doubts that a man printing a certain number of copies had the right to those copies, as he had to any other property, if he had a right to print them ; and therefore it required no Act of Parliament for that

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purpose. But the expression "copies" here, of course, is made use of to represent an exclusive right to those copies, as against the rest of the world. Observe, the Act of Parliament itself provides for three things: first, for books that have already been printed; next, for works composed, but not printed and published; and, thirdly, for works thereafter to be composed; and it gave an exclusive copyright for twenty-one years to books already printed. Now, we can nowhere find, upon the face of the Act, any express provision as to the necessity of printing here. Nor can we find any express provision that the first printing shall take place here; we find neither the one nor the other. It has been decided, and it is no longer to be disputed, nor is it attempted to be disputed, that the first publication must take place here; but that is only by implication; it is not by express enactment; it is only by implication from the provisions in the Act of Parliament. Well, then, if the first publication must take place here, must the printing likewise take place here? There is no such actual provision; it is not said so, but I apprehend it is implied; I think it is clearly implied from the provisions of the Act, that the printing must take place here. When books already printed have the term of twenty-one years given to them, it can hardly be supposed that Parliament meant to provide for books which had been printed abroad, the *object being clearly, whilst advancing learning and science, to advance also the interests of the British public. The provisions of the Act of Parliament, I think, clearly settle that point. It is quite clear that Parliament intended to benefit authors, and not importers; but section 7 of the Act of Anne expressly authorises the importation of books in the Greek, Latin, or other foreign languages; that, I think, at once inevitably leads me to the conclusion that no printed books in the English language were to be imported as within this Act of Parliament. I think that is perfectly clear. But the Act of Parliament does not say that books in foreign languages shall be original compositions; therefore I apprehend that it would have authorised the importation of a translation of an English book into a foreign language; but it does, by implication, show that the printing of English books is to be in this country, and not in a foreign country. My Lords, I think, therefore, that as far as regards the right with respect to books already printed, it must be considered to mean books printed here, and not books which had been printed abroad, and imported here; and that will give a key to the meaning of this statute in the other two cases to which I have referred.

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There is a later Act of Parliament, the 12 Geo. II. c. 36 (1), the object of which was to prohibit generally the importation of books reprinted abroad, which had been first composed or written, and printed and published here. That was a general prohibition; but it is impossible to read that Act of Parliament without coming to the conclusion that the Legislature then assumed that the books, to be entitled to the protection of the statute of Anne, must be books printed in this country; and yet there is no such express provision.

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Then as to the probable intention. If it is clear, as I *apprehend it to be, that, in the first place, a book which is a foreign composition must be first published here; and, secondly, that it must be printed here; would it not necessarily and naturally follow, that the man himself should be here to superintend that publication? Is it not a natural inference from the Act of Parliament, which does not expressly provide for either of the foregoing conditions, that it implies that the man shall be here, to superintend his publication, seeing that it shall not only be first published here, but that it shall also be printed here? Nothing could be further from the intention of the Legislature, at the time that this Act of Parliament was passed, than that a foreigner should be enabled to import books printed abroad; but unless you put that construction upon the Act of Parliament, he would have been able to import books printed abroad, and bringing them here, to have a copyright in their publication. That would plainly be directly contrary to the intention of the Legislature. I think, therefore, that gives us an easy means of interpretation as to the meaning of the statute, with regard to the residence of the publisher. All that is entirely independent of the general question, whether such an Act of Parliament as this could be considered as intended to benefit foreigners, *quà* foreigners, who are resident abroad. If this Act of Parliament extends to foreigners generally, then there is no reason why they should not publish here while they reside abroad. It seems not to be denied that an English author may reside abroad, and yet may have his rights as an English author, upon publication here. Why? Because he owes a natural allegiance, which he cannot shake off. Residence abroad (although he may thereby have come under some new obligations, or have acquired some new rights) will not relieve him from his natural allegiance; he cannot be relieved from it by any *foreign country, and therefore he carries with him the natural rights of a subject of England wherever he goes. That gives him, though resident abroad,

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the right to publish here, because he has always fulfilled the implied condition of being a subject of, and owning allegiance to, the Crown of Great Britain. That could not, of course, be said of any foreigner who was not actually resident here.

Now, my Lords, in the case which has been referred to of *Clementi v. Walker* (1), Mr. Justice BAYLEY, speaking of the statute of Anne, makes a few observations, in which I entirely concur, with regard to the intention of Parliament to confine the provisions of the statute to British interests. He says, "The statute of Anne, therefore, not only gives protection to authors as to books thereafter to be published, but to books previously printed; but the British Legislature must be supposed to have legislated with a view to British interests and the advancement of British learning. By confining the privilege to British printing, British capital, workmen, and materials would be employed, and the work would be within the reach of the British public. By extending the privilege to foreign printing, the employment of British capital, workmen, and materials might be superseded, and the work might never find its way to the British public. Without very clear words, therefore, to show an intention to extend the privilege to foreign publications, I should think it must be confined to books printed in the kingdom; and instead of there being any such clear words to show that intention, there are provisions which strongly imply the latter." I may observe that there is some incorrectness in this opinion of the learned Judge, because he seems to suppose that, "by extending the privilege to foreign printing, the employment of British capital, workmen, and materials might *be superseded;" that is true; but he adds, "and the work might never find its way to the British public." There is some error in that, of course, because unless the work did find its way to the British public, it never could claim, in any possible sense, copyright in this country; consequently every book, even if printed abroad, must find its way to the British public before it could claim the benefit of that Act of Parliament. But the opinion of the learned Judge, that the Act involves the necessity of printing in this country, is one in which I entirely agree.

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If there is no common-law right, which, in my opinion, there clearly is not, and if the statute does not apply to foreigners, *quà* foreigners, (although I entirely, of course, admit, that when a man owes temporary allegiance, he is entitled to the benefit of it,) then there being no common-law right, it would be a new right given by

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Act of Parliament, and the foreigner must bring himself within the terms of that Act of Parliament in order to enjoy it; and to do so, in my apprehension, he must be able to predicate of himself that he is a subject of these realms, at least for the time being.

Your Lordships' attention has already been sufficiently drawn to what was so much pressed upon you in argument, namely, the alleged absurdity, that a man might pass over from Calais and obtain the right here; whereas by remaining at Calais he could not acquire that right. Really that has no bearing upon this question; it does not depend upon whether the author is on the other side of the Atlantic, or is on the other side of the narrow channel between Dover and Calais, and can get over here in two hours; that is not the question: the question is, let him be where he will, is he or is he not a foreigner residing out of this realm, and claiming the benefit of copyright within the realm, whilst he is resident abroad. Whether, therefore, it is the *case of a man residing at Calais or on the other side of the Atlantic, it is exactly the same thing, and the attempted distinction has not the slightest bearing upon the subject.

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It is then said, that there is a difficulty with respect to what constitutes a residence here. Now, I will not take upon myself to state any opinion to your Lordships as to what would be a sufficient residence; but I will say this, that whatever would constitute a man a resident here, so as to make him subject, in point of allegiance, to the country, whilst he was here, and would give to him the common rights to which every foreigner coming to this country is entitled, would be a residence which would give him a copyright here if he published here. My Lords, it is much easier to deal with an implied right of this sort under the statute of Anne; that is, a right implied from his residence here; for you then have only to ascertain whether the residence is such as to make him owe temporary allegiance, and to give him temporarily the rights of a subject; it is much easier, I say, to deal with such a right than it would be to deal with the case of an express enactment that a man should not have the right unless he was a subject of these realms, or was resident here. If we had an enactment which expressly said that no one should have a copyright here unless, he was a native or a resident, the question would at once arise, what was the meaning of residence under the Act of Parliament; and it would be much more difficult to deal with the question under that enactment than with the general right of foreigners under the statute of Anne,

namely, considered as coming under that statute, like any other statute, or under the common law, as persons resident here, acquiring the right of subjects, and being temporarily subject to the obligations of the English law.

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There is no such difficulty in the American legislation. The Legislature of the United States has expressly enacted that copyright there shall be confined to natives or to persons resident within the United States; those are the express words of the Act of Congress, and there has not been found any difficulty at all in deciding what was residence. We have been pressed very much at the Bar with the difficulty of stating what would be a sufficient residence; but there is no reason why we should have any difficulty in this case upon that ground. The American law also takes care to prevent copyright attaching upon importation. The consequence of that of course is, that people are enabled to import the works of other men, for the copyright of which they have never paid any consideration. And I may remark, in passing, that, although nothing could be more improper than to consider the state of international law in deciding a question upon our own municipal law, (for here we must decide this question, not with reference to the relation in which we stand to the United States, or any other country with respect to copyright, but as it regards our own law in the abstract, without reference to any other country at all), yet I may observe, that the strained construction which would give to a foreigner the right which is now claimed, would have the effect of placing this country not on a level with the United States. For example, the United States do not allow a foreigner resident out of them to obtain a copyright there; but the American publisher imports his books the moment they are published, and sells them without difficulty and without interruption. In the United States they attempted to bring in a bill in order to reconcile the laws of the two countries, and to put authors upon the same footing in each country. That attempt did not succeed. That of course does not show what our law is, but it shows that we are not called *upon to put any strained construction upon our own Act of Parliament in order to give to foreigners a right which their law denies to us. If, however, I found that in our Act of Parliament the right was given, I should not stop to inquire whether or not it was given in the United States, because I must be bound by our own law, and put a proper construction upon that law. As it regards that point, however, with respect to residence, I do not feel any difficulty.

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I may observe, in passing, with reference to printing here, that the case of *Page v. Townsend* (1), which has been already referred to, although upon a different point, has a bearing upon that subject. It was there held, that prints engraved and struck off abroad, but published here, were not protected from piracy under the Act; and therefore if works could be printed abroad, and then, being imported, could obtain a copyright here, you would be giving to works of a general nature a right which is not extended to prints and engravings. On the whole, therefore, my own opinion in the abstract upon the general question is, first, against any common-law right, and, if the common-law right existed, clearly against the right of a foreigner to claim the benefit of it, and secondly, against such a construction of the statute of Anne as would give to a foreign author, resident abroad, the right possessed by an Englishman upon a first publication here.

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But there are other considerations in this case, which have been elaborately argued, and upon which the case may turn, and to which I think it proper shortly to call your Lordships' attention. The first question is, whether there is, in the person who claims here the exclusive power of publication, any right whatever to copyright in this country. The bill of exceptions states it in this way; that there is by the law of Milan a copyright in Bellini, and that *Bellini transferred that copyright to Ricordi. Now, just stop there for a moment, and let us see how it will stand. A copyright by the law of Milan can of course have no effect in this country. I do not myself quite understand the doctrine of jurists, when they say that a first publication abroad gives a general right; because it is rather difficult to conceive, that if a man publishes in his own country, and the copyright is secured to him by the law of that country, giving him, under the sanction of that law, a limited right in his own country, that he thereby acquires in all other countries an unlimited right. If you were to look at international objections, it would be rather difficult, perhaps, to come to that conclusion; but, however, that is rather a separate point. Now, the law of Milan, which gave to Bellini this copyright, could, of course, give him no right in this country; that is perfectly clear. But it is said that he has a right to his composition, such as he would have to any personal chattel, and that that right being properly transferred, as is stated in the bill of exceptions, by the law of Milan to Ricordi, who afterwards transferred it to Boosey, therefore the right now

exists in Boosey. The first question is, how can a right exist in Bellini as a foreigner, to copyright in this country? He has it by the law of Milan, because he is a native-born subject, or a subject, at all events, by residence; and the law of that country gives it to him; but the moment he steps out of that country, he can have no other right than is involved in the mere possession of the subject-matter in his hands, except so far as the law of any country to which he resorts may give him such a right. Then in order to obtain copyright here, he must come and perform, as I have already shown, the condition annexed to the enjoyment of that right; and I hold it to be perfectly clear that that condition is, that he must reside in the country. *Then, if that is so, as Bellini did not perform the condition, he never had the right to assign, and he could not assign that which never existed. Remaining abroad, he could not have the right, for the common law of this country gave him no such right. Neither did the statute law of this country give him any such right. Therefore, whilst at Milan, he had a Milanese copyright; but he had not, and could not acquire, a British copyright; and if he had no right in this country, he could assign none. I hold it, therefore, to be perfectly clear that that would be of itself an answer to the claim.

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But I think that in the argument at the Bar it was said, that there was an assignment of the general right to the copy, and that therefore the party bringing it here would be entitled to the benefit of the statute. If you will look at the bill of exceptions, you will find it stated (it may be a technical construction, but I hold it to be a statement out of which you are not at liberty to depart) that the thing assigned by Bellini was the Milanese copyright. Then, if it was the Milanese copyright, and that copyright gave no right here, and the condition had not been performed which must be performed before any right could be acquired here, the assignment was altogether void as regards this country, and consequently it could not transfer any right to Ricordi. But supposing it did transfer a right to Ricordi, then what right did Boosey obtain under Ricordi? Why, the assignment from Ricordi to Boosey was expressly confined to publication in this country. Now, if there is one thing which I should be inclined to represent to your Lordships as being more clear than any other, in this case, it is, that copyright is one and indivisible. I am not speaking of the right to license; but copyright is one and indivisible; or is a right which may be transferred, but which cannot be divided. Nothing could *be more absurd or

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inconvenient than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the inconvenience would be. You might have a separate transfer of the right of publication in every county in the kingdom. If, however, the right, as I am advising your Lordships, is properly one and indivisible, then let us see what construction can be put upon the assignment from Ricordi to Boosey. The exercise of the right is confined in that assignment to the United Kingdom. Now, by the 41 Geo. III., c. 107 (1), copyright is extended to any part of the British dominions in Europe, and by 54 Geo. III. c. 156 (1), it was further extended to every other part of the British dominions. It is quite clear, therefore, that if in this case there was a copyright, under the law of this country it was a copyright which extended to every portion of the British dominions. Then, as Ricordi limited his assignment to the United Kingdom, and therefore reserved to himself the right as regarded the publication in every other part of the British dominions, even considering the right in England, if I may so call it, as being capable of being secured from any foreign right, it would consequently be a partial assignment; and as a partial assignment, I should venture to recommend your Lordships to decide that it was wholly void, and therefore gave no right at all.

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There is also, let me observe, this particularity, that as the assignment from Ricordi is confined to the United Kingdom, Ricordi himself might, without any breach of his contract, have published this composition in any other part of the British dominions; he might also, by his Milanese right, have published it the very next day in Milan, without infringing on the right of Boosey under the assignment. *The more, therefore, the question is considered, the more, I apprehend, it will appear clear that the assignment in question was void, because it was limited to the United Kingdom, and did not extend to the whole of the British dominions; and that objection exists independently of the question, whether the Milanese copyright could be reserved, and the supposed right in England could be assigned.

My Lords, there is another question which would also decide the case in one view of it; and that is a question upon the assignment itself. I hold it to be perfectly clear, that if, according to the proper construction, an assignment of a copyright ought by the law of England to be attested by two witnesses, no assignment of a copyright, the benefit of which is claimed by the assignee, although

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from a foreigner, can be held good in this country unless it is so attested. It is not a question whether the Milanese copyright could be assigned by the law of Milan, for the law of Milan has no effect here. And if, in order to protect the public and the author, Parliament has thought fit to enact, that the assignment shall be attested by two witnesses, then that must equally apply to every person claiming the benefit of the statute, whether he is a foreigner or not; because, as I have already repeatedly stated, the question is not whether he is a foreigner or not, but whether, being a foreigner, he owes such a temporary allegiance to the Crown of this country as gives him the right under the statute. It is very true, that the statute of Anne does not in words expressly require that there should be two witnesses to an assignment, but the statute requires that there should be two witnesses to a consent; and it has been established by several authorities, and among others, by the case of *Davidson v. Bohn* (1), decided since the 54 Geo. III., that an assignment must be attested by *two witnesses. The ground of that decision is simply this, that when it was found that by the Act of Parliament the consent to a publication must be attested by two witnesses, it was naturally to be inferred that an assignment, which was of a higher nature than a mere consent, must have the same solemnity. Now that has been a settled point, which your Lordships, I am sure, will not disturb. I may observe that the 41 Geo. III. c. 107 (2), required the consent to be in writing, and to be signed in the presence of two or more credible witnesses. The 54 Geo. III. recited the former enactments, generally extended the copyright, and spoke of the consent in writing, but said nothing about the two witnesses. It is to be observed that opinions have very much differed upon this question. On the one hand, it has been said that it was only by implication from two witnesses being required to the consent, that it was held by our Courts that two witnesses were required to an assignment; and that therefore, when the latter Act, the 54 Geo. III. c. 156 (2), no longer required two witnesses to a consent, the reason failed for requiring, by implication, two witnesses to an assignment. I cannot go along with that reasoning. It appears to me that it was properly decided that the assignment ought to be attested by two witnesses; that was decided upon the Act of Anne, as it stood originally, and as it was originally, and properly, construed. Then, if by a later Act you take away that which was no doubt the ground of the

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(1) 6 C. B. 456.

(2) Repealed, 5 & 6 Vict. c. 45, s. 1.

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decision, namely, the necessity for two witnesses to a consent, does it follow that you therefore repeal that which was the proper construction of the law applicable to the higher instrument; namely, that the assignment also required two witnesses? It would rather seem, after such a tenor of determinations, after the law had been so settled, that the Legislature, by being silent with regard to the assignment, meant that to remain, although it altered *the law with respect to the consent; and, therefore, I should certainly advise your Lordships, if it were necessary to come to a conclusion upon this point, that it was rightly decided that the assignment ought to be attested by two witnesses, and that that was not altered by the Act of the 54 Geo. III. The Act of Anne, and the Act of the 54 Geo. III. may well stand together; the latter one does not repeal the former expressly, and there is no reason why it should do so by intendment; and with respect to the assignment, the Act of Anne being referred to generally by the 54 Geo. III. must be considered to be referred to as bearing the construction put upon it by the authorities.

Upon all the grounds which I have stated, I have come to a conclusion satisfactory to my own mind, but at the same time not without great consideration and much hesitation; not hesitation, I must candidly say, created by any doubt which I have myself felt; but I have been impressed, and properly impressed, not only by the argument at the Bar, but by the elaborate opinions which have been delivered on the other side by some of the learned Judges. Agreeing, as I do, with my noble and learned friends in the conclusions at which they have arrived, my advice to your Lordships is, that the decision below should be reversed.

Judgment of the Court of Exchequer Chamber reversed.

Judgment of the Court of Exchequer affirmed.

1853.
April 28, 29.
May 2, 3.
Aug. 20.

Lord ST.
LEONARDS,
L.C.

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OWEN v. HOMAN (1).

(4 H. L. C. 997—1038; S. C. 17 Jur. 861.)

It is a matter of discretion for the Court of Chancery whether it will or will not interfere by interim order respecting the property of a litigant. If the property is *in medio* (in the actual enjoyment of no one), the Court will interfere for the benefit of all concerned.

When a married woman, having separate estate, is a party to a suit, the

(1) *Oriental Financial Corporation Rouse v. Bradford Bank* [1894] 2 Ch. v. *Overend, Gurney & Co.* (1871) L. R. 32, 65, 63 L. J. Ch. 890, 71 L. T. 522. 7 Ch. 142 (affd. L. R. 7 H. L. 348);

interference will be accorded or refused according to the circumstances of the case.

Where the Court summarily interferes against the legal possession, it has a right to expect a plaintiff to proceed with the most complete and honest diligence to obtain a decree. Delay in his proceedings constitutes an objection to the proposed interference.

Though a creditor may not, in every case, be bound to inquire into the circumstances under which a third person becomes surety to him, he is so when the dealings between the parties are such as to lead to a suspicion of fraud.

It is a general rule that a creditor may give time to a principal debtor without prejudicing his right against the surety, provided he expressly reserves such right. Circumstances may, however, prevent that rule from having effect.

A creditor of a partnership, consisting of two persons, had received from one of them joint and several promissory notes, accepted by himself and a third party, a married woman, having separate estate. The partnership was afterwards dissolved by deeds, by virtue of which the second partner, on giving up certain title-deeds, was altogether exonerated from liability to the creditor, who, however, expressly reserved his rights on all notes and other securities which he held in his hands at the time of the execution of these deeds. These transactions were wholly unknown to the third party, who was the surety on the notes. There were various circumstances which might have awakened the suspicion of the creditor, and he had not taken any steps to inform the surety as the notes became due that she had become or continued liable upon them. In a bill for an account and a receiver, filed by the creditor, the surety put in an answer detailing these circumstances, and alleging fraud:

Held, affirming the decree of the LORD CHANCELLOR (who had reversed an order of the MASTER OF THE ROLLS), that this was not a case in which the Court would interfere by appointing a receiver.

THE appellants, in the year 1844, and for several years previously, had carried on the business of bankers at Worcester, under the name of Farley & Co. The respondent was a married woman, who possessed property acquired from her first husband, which property was, on her second marriage, settled on her for life, with a power of appointment thereof by deed or will. The appellants had acted as the bankers of a partnership of grocers, wine merchants, and provision dealers at Worcester, trading under the name of Harris, Bowers & Co. This partnership consisted of two persons, named Mary Ann Harris and John Bowers. The appellants, being in advance to this partnership, had pressed Bowers, who alone acted in the management of the business, for some security, and Bowers had, on different occasions, brought them joint and several promissory notes and bills of exchange, signed by himself and by the respondent. The partnership of Harris and Bowers having become bankrupt, the appellants, on the 29th November, 1849, filed a bill against the respondent, and against her husband,

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and the trustee under her settlement, to compel payment of the notes to which she had been a party.

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The bill set forth the transactions between the appellants and Bowers, the delivery of the notes and bills, and the settlement on the respondent's marriage, and prayed that it might be declared that the rents and profits, &c. of her separate estate under her deed of settlement were liable to the plaintiffs for the principal and interest due on three promissory notes, dated respectively 28 December, 1844, for 1,000*l.*, 2 April, 1845, for 500*l.*, and 20 January, 1848, for 3,000*l.*, and that the sums due thereon might be raised out of the said estate, the plaintiffs being ready and willing to account for any moneys received from the respective estates of Harris and Bowers on account of such notes, or any of *them, and that an account might be taken and a receiver appointed.

The respondent, in March, 1850, put in her answer to the bill, in which the following allegations were made: She admitted the possession of separate estate under the will of her first husband, to whom she was married in 1798, and who died in 1829, and the settlement of the same estate on her second marriage in November, 1836. She stated that she had formerly employed one Matthew Elgie, of Worcester, as her attorney and solicitor, and then one Thomas Jones, of the same place, in the same capacity; that each of these persons had quitted Worcester, carrying with him some of her papers; that in August, 1848, she had a serious fall, which caused her for a time to be deprived of her mental faculties; that she was now in the eightieth year of her age, and that her memory as to recent occurrences had become enfeebled and perplexed. She then averred that John Bowers (who was her nephew), in or about the month of December, 1844, applied to her, stating that he wished to borrow a sum of money of the firm of Farley & Co. for a short time for the purposes of his partnership, and requested her, as a temporary security for such advance, to join him in a bill of exchange or promissory note to the said firm for 100*l.*, which, after considerable hesitation, she agreed to do, he promising that he or his partner would pay the same at maturity, and she accordingly joined him in a bill or note, which she had since found to have been really drawn for 1,000*l.*, the date whereof she was unable to set forth: That she believed Bowers almost immediately took the bill or note to the banking-house of the said firm of Farley & Co., and obtained an advance to his said partnership on the security thereof, which advance, however, was debited, as she now believed,

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to the partnership account: That some considerable time afterwards Bowers again applied to her, and *requested her, for the purpose of enabling him to procure a further advance from the bankers, to join him in a bill or note to their firm for 500*l.*, and in reply to the objections which she made so to do, urged that she would be incurring no risk, for that it was a mere matter of form, inasmuch as Harris, Bowers & Co. would take up the bill or note, as he alleged that they had done with respect to the former bill or note: That she, relying upon such statement and promise, consented to join Bowers in such note, and did so accordingly; and she believed that Bowers immediately took the same, the date whereof she was unable to set forth, to the firm of Farley & Co., and obtained an advance to his said partnership on the security thereof, which was debited to the partnership account: That some considerable time, and as she believed, full three years afterwards, Bowers again applied to her for a similar accommodation; to the extent, as she understood and believed, of 300*l.*, stating that he had made some large purchases of tea at cash prices; and in order to induce her to comply with such request, stated that the bill or note which he then wanted would be provided for by his firm, as he alleged that the said two former bills or notes had been: That, confiding in such representations, and being aware that although she had on more than one occasion called at the said Bank, and although Mr. Veale, the managing clerk of the Bank, had frequently visited at her house since she had joined in such bills or notes, no applications had ever been made to her by or on behalf of Farley & Co., or any other person or persons, for payment of the same, nor any mention of either of them had ever been made to her, she complied with the last-mentioned request of Bowers, and either gave him a note, or accepted a bill for, as she was then told, the sum of 300*l.* (she denied ever having joined Bowers in a note for 3,000*l.*) drawn upon her *by Bowers, the date whereof, however, she was unable to set forth, but which bill or note was afterwards, as she had been informed and believed, handed over by Bowers to the bankers: That the bankers were, as she, defendant, verily believed, fully cognizant of all the representations made by Bowers to her to induce her to join in, or to give the several bills or notes, and of the representations made to her that the two first-mentioned bills or notes had been satisfied prior to Bowers applying to her for the said third and last-mentioned bill or note: That the said Farley & Co. did, in fact, after the bills or notes respectively came to their hands, receive from or on account of the partnership

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of Bowers, Harris & Co. divers sums of money to an amount much more than sufficient to satisfy and pay the amounts of the said several bills or notes : That she had recently discovered that prior to and at the time of each of the said three several applications to her by Bowers, the partnership of Harris, Bowers & Co. was very largely indebted to Farley & Co. : That she believed it was at the suggestion of Farley & Co. that Bowers made such applications to her, and that they purposely concealed from her the state of their account with Harris, Bowers & Co., in order that Bowers might prevail upon her to join in such bills or notes : That Farley & Co., between the middle of 1844 and December, 1848, entered into large speculations with Harris, Bowers & Co., respecting the purchases of wine, tea, coffee, and other goods, and that Harris, Bowers & Co. from time to time deposited with Farley & Co. wine, tea, and coffee warrants, or other securities ; that many of such securities had since been realised by them, and that others to a large amount still remained in their hands, but that Harris, Bowers & Co. were still made to appear indebted to Farley & Co. in 17,448*l.* and upwards : That Harris, Bowers & Co. *were hopelessly insolvent in December, 1848 ; and that their insolvency was well known to Farley & Co., who sedulously concealed such insolvency, in order to secure to themselves priority of payment over the other creditors of Harris, Bowers & Co., and that in order to obtain such priority of payment, they concocted the scheme appearing from certain deeds and instruments thereafter stated, and the dissolution of the partnership, and the formation of a new partnership between said John Bowers and his brother and sister-in-law : That she believed that some time prior to 22nd December, 1848, a meeting took place between Farley & Co., and Harris, Bowers & Co., for the purpose of investigating the affairs of the latter, at which meeting it was discovered that Harris, Bowers & Co. were wholly insolvent, and it was made to appear that 17,448*l.* and upwards were due from Harris, Bowers & Co. to Farley & Co. on the 2nd December then instant, the said sum including the sums, if any then remaining, due to Farley & Co., in respect of the moneys collaterally secured by the respective bills or notes of her, this defendant.

The answer then alleged an arrangement between Harris, Bowers & Co., and Farley & Co., by which the partnership of the former was to be dissolved, and Mary Ann Harris was to be released from all liabilities in respect thereof ; that she should assign to Bowers all her interest in the partnership assets, and that he should

execute to Farley & Co. a bond for the amount of the partnership debts, and should authorise them to collect in all the outstanding assets of Harris, Bowers & Co., and to apply the same in liquidation of their claims. The answer went on to allege the execution of certain articles of agreement and a bond (afterwards fully set out), and to aver that Veale, the managing clerk of Farley & Co., was employed by night to take a private account of the stock of Harris, *Bowers & Co., and that David Nash, of Worcester, accountant was employed to collect the debts due to that partnership; but in order to conceal the real object of such collection of debts, it was stated, in a circular sent to the debtors, that the debts were got in in consequence of a change in the partnership.

The answer then set forth the articles of agreement thus referred to. They were dated 22nd December, 1848, and made between Mary Ann Harris of the first part, John Bowers of the second part, and the plaintiffs of the third part, and by them it was agreed that Bowers should take upon himself the payment of all the outstanding debts of the partnership of Harris and Bowers, and particularly the debt due to Farley & Co. of 17,448*l.*, as settled up to that date, with interest, and that Bowers should, as the consideration for Mary Ann Harris retiring from the partnership, undertake to give up to her within three years next ensuing the title-deeds relating to her house and premises in the Corn Market, Worcester, where the partnership business was then carried on, and that Bowers should carry on the business, as and from the 22nd December, upon his own account, and that in the meantime and until he delivered up her title-deeds, &c., he should pay her for life 100*l.* per annum, and should be at liberty to exonerate himself from the further payment of such annuity at any time upon his handing over to M. A. Harris her title-deeds, &c., and paying all arrears of such annuity up to such time, and paying the partnership debts, which title-deeds were then deposited by her with Farley & Co. as a collateral security for the floating balance of their debt; and that Bowers should release M. A. Harris from all partnership debts and liabilities, and should pay Farley & Co. the debt of 17,448*l.* by monthly instalments of 200*l.* per month, and in default in paying any one instalment, *the whole debt should be immediately recoverable, with all interest thereon; and Bowers should execute to Farley & Co. his bond as a further security for the payment of said debt in manner aforesaid; and that such bond should be deemed and taken to be an additional or a collateral security only for the

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payment of the partnership debt, and should in nowise be deemed to be a release, satisfaction, or extinguishment thereof, or of the liability of M. A. Harris; and that the said debt should be payable to Farley & Co., who should have the same remedies for the recovery thereof as if said bond had not been taken, and that while such instalments should be duly paid, the existing sureties for Farley & Co.'s debt of 17,448*l.* should not be proceeded against, except to save the Statute of Limitations: Provided nevertheless, that in case of the death, bankruptcy, or insolvency of any surety, then the whole amount due from him or her to be immediately thereupon paid to and recoverable by Farley & Co.; and that if default should be made in payment of any instalment of 200*l.* a month, or if any surety should die or become bankrupt or insolvent, then the debts of the sureties should be immediately thereupon recoverable by Farley & Co., who should be at liberty to take proceedings at law or in equity against all or any of such sureties; and that Bowers should forthwith use his best endeavours to dispose of the wine and spirit trade, the moneys arising therefrom to be immediately paid to Farley & Co., in part reduction of their debt; and that in consideration of the previous articles in such agreement contained, and of said debt being collaterally secured by the bond of Bowers, and of M. A. Harris having given up her interest in said businesses, the appellants agreed with M. A. Harris not to take or institute any proceedings at law or in equity or in bankruptcy against *her, M. A. Harris, for recovery from her of their said debt of 17,448*l.* or any part thereof, save and except as might be necessary for the purpose of recovering the same against Bowers, and suing and proceeding against M. A. Harris jointly with said John Bowers for that purpose, and save and except that they should be at liberty to call upon M. A. Harris to execute (and said M. A. Harris thereby agreed, when so called upon, to execute) a mortgage to them of the said premises in the Corn Market, Worcester, with the usual power or trusts of sale, and other usual or necessary clauses and agreements, but that such mortgage was not to contain any covenants on the part of said M. A. Harris for the payment of the said debt, and that in the meantime, and until such mortgage should be so executed, the title-deeds and writings of the said premises to which they related were to remain liable to said debt and interest; and it was thereby provided that in case the appellants should bring any action or take any proceedings either at law or in equity against M. A. Harris and Bowers for the

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purpose of recovering any portion of the said debt from Bowers, it was expressly understood and agreed not to levy execution against M. A. Harris or against her real or personal estate; and it was thereby agreed that the several matters and things thereinbefore contained should be forthwith carried out, and the expenses attending the same, as also the expense of Farley & Co.'s solicitors, to that time, should be borne by Bowers, and that the said agreement, or any article, clause, matter, or thing therein contained, or the giving or accepting the said bond payable by instalments as aforesaid, should not in anywise or in any event be deemed or construed to prejudice, annul, or otherwise affect the rights or remedies of Farley & Co., upon or against any person or persons liable as sureties or otherwise, or as drawers, indorsers, makers, or acceptors of any bill or bills of exchange, or promissory note or notes, or *other securities which they, Farley & Co., then held, but that all such persons should be liable thereon by virtue of such securities to the same extent and manner as they otherwise would have been had those presents not been made, or such bond given, any rule or practice in law or in equity to the contrary notwithstanding; and that Farley & Co. should not take or institute any proceedings at law or in equity against Bowers so long as the said monthly instalments of 200*l.* per month were duly paid, except in respect of the happening of the events thereinbefore mentioned, or any of them, and except at the instance or request of the said sureties, or any of them, and except also on the event of Bowers making default in any or either of the said articles therein contained on his part.

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The answer then alleged that Bowers executed a bond, dated 22nd December, 1848, to the plaintiffs, in the penal sum of 84,896*l.*, and that it was by such bond recited that Bowers and M. A. Harris, his partner, were jointly indebted to the plaintiffs in the sum of 17,448*l.* on their banking account up to the second day of that month; and that Bowers had to execute unto the plaintiffs his bond as a collateral or further security for the payment to them of said debt of 17,448*l.* by instalments in manner thereafter mentioned; and the condition of the said bond was, that if Bowers, his heirs, &c., should pay unto the plaintiffs, their executors, &c., the full sum of 17,448*l.*, together with 5*l.* per cent. interest, to be computed from the 2nd of that month, until the whole of the said principal sum of 17,448*l.* and interest, at the rate aforesaid, should have been fully paid, then the bond was to be void; and it was provided, that in case default should be made in payment of any of

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the said instalments, the whole of the principal sum of 17,448*l.* and interest, or so much, &c., should forthwith immediately upon such default become due and payable to the said plaintiffs, and be recoverable by virtue of *the bond. And that if Bowers should die, or become bankrupt, insolvent, or make any composition with his creditors, or permit any execution of *fiery facias* or *capias ad satisfaciendum* to issue against him before the whole of the debt of 17,448*l.* and interest had been paid and discharged to the plaintiffs, &c., then that the whole of the principal sum of 17,448*l.* and interest, &c., should immediately upon such death, bankruptcy, insolvency, assignment, or suffering execution to issue, as the case might be, become payable to the plaintiffs, and be recoverable by virtue of said bond.

The answer then alleged an indenture made between M. A. Harris and J. Bowers on the 22nd December, 1848, by which they dissolved their partnership from that day, and M. A. Harris assigned to Bowers all the stock, debts, books, &c. It then set forth an indenture of the 29th December, 1848, between M. A. Harris and Bowers, by which, after reciting their previous agreement to dissolve partnership, and the existence of a debt of 17,448*l.* due from them as partners to Farley & Co., and that Farley & Co. held as a collateral security the title-deeds of the premises occupied by Harris and Bowers in Worcester, with an agreement by her to execute a mortgage of such premises, and that it had been agreed that she should be released from all personal liability for the payment of the debt, and that Bowers should pay the whole by instalments, but so as not to affect the deposit of the title-deeds which should remain in the hands of the bankers; and reciting the articles of agreement of 22nd December, 1848, it was witnessed, &c.; and then the agreement of the 22nd December was carried into effect.

[*1008]

The answer then alleged the execution and deposit of deeds, in conformity with the agreements, and also the payment of large sums of money, which were declared to *have been paid to Farley & Co. on account of the partnership debts of Harris, Bowers & Co., and it went on to state various particulars in order to show that the respondent had been deceived into giving these notes, and that the appellants were aware of all the circumstances under which she had given them; and she submitted that, by the transactions which had thus taken place, she was released as surety from the payment of any part of the monies theretofore due from Harris, Bowers & Co. to Farley & Co.

The case came on to be heard on a motion for appointing a

receiver; and the MASTER OF THE ROLLS made an order for a receiver (1), which order was taken by appeal before Lord Chancellor TRURO, who directed the same to be discharged. The present appeal was brought against his Lordship's decision.

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(At the beginning of the argument for the respondent, it was noticed that the only respondent who appeared at the Bar was Mrs. Homan; and it was said that her husband had not even been served with the petition of appeal. It was answered that he was only a nominal party, and, as the claim related entirely to the separate estate of the wife, that he was not affected by it, and must stand by and submit to any decree that was made; and further, that he had been served with the original bill, and had put in an answer disclaiming all interest.

THE LORD CHANCELLOR :

The objection, if otherwise well-founded, could not be urged now. An objection for defect of parties must be taken before the Appeal Committee.)

Mr. Rolt and Mr. Hallett for the appellants :

The respondent here, a married woman, is possessed of separate property. By the principles of equity, that property became liable to the payment of the securities she *had joined in making. This liability can only be enforced as against a married woman by the Court granting the application for a receiver. The respondent has a power of appointment, but cannot be compelled to exercise it, and, except that, she has only a life estate in the property. She is nearly eighty years of age, and under these circumstances the appellants are entitled to the order for a receiver, for as to them the property must be deemed perishable property. The respondent is a surety to the appellants on behalf of their debtor. They have entered into an arrangement with that debtor, by which they have given him time, and which may be taken to have been entered into without the knowledge of the surety; but the creditor expressly reserved all his rights against the surety, and the question is, whether that giving of time to the principal could, under these circumstances, operate as a release of the surety? It is submitted that no such effect can be attributed to it.

[*1009]

[They cited *Ex parte Gifford* (2), *Boulton v. Stubbis* (3), *The Bank of*

(1) 88 R. R. 463 (13 Beav. 196).

(3) 11 R. R. 141 (18 Ves. 20).

(2) 6 R. R. 53 (6 Ves. 805).

OWEN *Ireland v. Beresford* (1), *Kearsley v. Cole* (2), *Smith v. Winter* (3),
 v. *Wyke v. Rogers* (4), and other cases upon this point.]
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[1015] *Mr. Roupell* and *Mr. Elderton* for the respondent, [contended that she was discharged from liability by the arrangement between the appellants and the debtor; but as the appeal was dismissed on a different ground, it becomes unnecessary to refer to their arguments or to the cases cited by them upon that point].

[1026] *Mr. Rolt*, in reply.

Aug. 20. THE LORD CHANCELLOR:

[1029] This case was heard some time since at your Lordships' Bar, when the circumstances under which it came before you on appeal appeared to be these. (His Lordship here *stated the parties, their situation, and interests, and the chief allegations in the bill and answer.) The substance of the transaction, as stated in the answer, is, that Mrs. Homan, at the instance of her nephew, joined him, in December, 1844, in a promissory note for 100*l.*, in order to enable him to borrow money from the Bank on that security; that some time afterwards, on his representations that the note had been duly taken up and paid, she joined him in another note for 500*l.* for the same purpose; and again, on a third occasion, in a further note for 300*l.*, on a like representation that the two former notes had been duly taken up and paid. It is necessary also to bear in mind Mrs. Homan's account of an interview between herself and the plaintiff Gutch, who was accompanied by Mr. Hyde, his solicitor. She says: "That about a month previously to the time of the bankruptcy of Bowers, and, as she best recollects, on or about the 9th of July, 1849, the plaintiff Gutch, accompanied by his solicitor, Mr. Hyde, of the city of Worcester, came to the residence of defendant, at Welland, and produced various documents purporting to be bills of exchange, or promissory notes, which, as she best recollects, Mr. Hyde represented that she was liable to pay: That having called into the room Mrs. Jane Bayes, a sister of Bowers, she requested Mrs. Jane Bayes to take the particulars of said bills of exchange, or promissory notes, but that Mrs. Jane Bayes requested Mr. Hyde to take such particulars, which, as defendant believes, he did: That Mr. Hyde then, in the presence of Mrs. Jane Bayes, asked defendant what she meant to

(1) 19 R. R. 50 (6 Dow, 233).

(2) 73 R. R. 436 (16 M. & W. 128).

(3) 51 R. R. 678 (4 M. & W. 454).

(4) 91 R. R. 133 (1 D. M. & G. 408).

do with respect to payment of them, or to that effect, and that she, defendant, replied that she was not liable to pay them, and could not pay them, and that, in fact, Bowers owed her money, or expressed herself to that effect." She was then asked about the bills or notes, and *denied her signature to them, and stated, "as she then believed, and still believes, that she never joined Bowers, or any one else, in a bill of exchange for 3,000*l.*, and added, that she never joined Bowers in any bill of exchange, but for a small amount; and that Bowers had always told her that they had been taken up, or expressed himself to that effect; and defendant added, as the fact was, that Bowers owed her money, and that the bankers were aware of it; and that she had asked him some time since for better security than she held, and that he had told her that he was about purchasing the premises in the Corn Market, and that she should have the deeds, or made some statement to that effect, and that the plaintiff Gutch remarked that he and his co-partners had had those deeds for the last five years, or to that effect: That said plaintiff afterwards asked defendant what was to be done with respect to the bills of exchange, or promissory notes, and that Mrs. Jane Bayes replied he must take them to Worcester, and make those pay who had the money from him and his co-partner, for defendant had nothing to do with it, or expressed herself to such or the like effect, and that plaintiff Gutch replied that they could not do that, for they (meaning Mary Ann Harris and John Bowers) owed them more than that on another account, or expressed himself to that effect; and also said, to justify himself and his partner for having trusted Harris and Bowers, that it was the best ready-money account in Worcester; that they turned from 70,000*l.* to 80,000*l.* a year, and that their (appellants') managing clerk had, in or about January, 1849, been engaged for three days and nights in investigating the affairs of the firm of Harris, Bowers and Co., and that they were then worth 11,000*l.*, or expressed himself to such or the like effect."

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The plaintiffs moved for the appointment of a receiver, *which was granted by Lord LANGDALE, whose order was reversed by Lord TRURO, and the case has now come by way of appeal to your Lordships. The question to be decided is, whether this House ought to reverse Lord TRURO's order.

[*1032]

The receiver, if appointed in this case, must be appointed on the principle on which the Court of Chancery acts, of preserving property pending the litigation which is to decide the right of the litigant parties. In such cases the Court must of necessity

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exercise a discretion as to whether it will or will not take possession of the property by its officer. No positive unvarying rule can be laid down as to whether the Court will or will not interfere by this kind of interim protection of the property. Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. Such is the case when a receiver of a property of a deceased person is appointed pending a litigation in the Ecclesiastical Court as to the right of probate or administration. No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to anyone by taking and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the Court may by its interim interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. *In all cases, therefore, where the Court interferes by appointing a receiver of property in the possession of the defendant before the title of the plaintiff is established by decree, it exercises a discretion to be governed by all the circumstances of the case.

[*1033]

When the evidence on which the Court is to act (here the only evidence is the answer of Mrs. Homan) is very clear in favour of the plaintiff, then the risk of eventual injury to the defendant is very small, and the Court does not hesitate to interfere. Where there is more of doubt, there is of course more of difficulty; the question is one of degree, as to which, therefore, it is impossible to lay down any precise and unvarying rule. In this case Lord TRURO did not think the title of the plaintiff was so clearly made out as to justify the Court in turning the defendant out of possession before the plaintiffs had finally established their right, and I am not prepared to say that the conclusion at which he arrived was wrong; on the contrary, I think it was right.

There is no doubt upon the face of this answer, the only evidence on which the Court can here act, that the defendant was induced to sign the notes in question on representations, made to her by

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Bowers, altogether false. She states her belief that the bankers, now represented by the plaintiffs, were cognizant of all the representations so made to her. I do not place much reliance on the fact that she states this to be her belief, because no doubt it is to be treated merely as the inference which she draws from the facts stated in the answer, and not as a belief grounded on other matters known to herself alone. But the question is, whether the facts stated do not fairly warrant such a belief.

The case of the plaintiffs is one full of suspicion. The defendant was an old lady of the age of seventy-five at the date of the earliest transaction in December, 1844. She *had married a second husband in 1836, when she was sixty-six or sixty-seven years of age, and in March, 1850, when she put in her answer, she had been for some years living apart from this husband. Her memory had been impaired by reason of a serious accident in the summer of 1848, and she had been placed in some difficulty by the absconding of two solicitors whom she had successively employed to manage her property.

[*1034]

It is impossible not to believe that the bankers must have known what were the circumstances of the defendant. Though she did not (so far as it appears) keep an account with them, yet she had on more than one occasion called at the Bank, and their managing clerk frequently visited at her house at Welland, and so appears to have been on terms of intimacy with her, Welland being near Upton, one stage from Worcester. The bankers before they acted on the faith of defendant's security must have made inquiries and ascertained, if they did not previously know it, that the defendant was an infirm old lady, not having (so far as it appears) any one near her to protect or advise her on matters of business. She was a married woman, and they must therefore have satisfied themselves that she had separate property, otherwise they would have known that her promissory note was mere waste paper. They could not but have known that Bowers, at the date of the several notes, was pressed for money, in fact within less than a year after the date of the last note he had become hopelessly insolvent. They could hardly have supposed that the defendant knew the state of her nephew's affairs; in other words, they must have suspected that he deceived her in order to get her to give securities which would enable them to strip her of all her property for her life, unless (which they must have known was highly improbable) Bowers himself should be able to pay his debts.

Without saying that in every case a creditor is bound *to inquire {

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under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, he is bound to make inquiry, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject. In some cases wilful ignorance is not to be distinguished in its equitable consequences from knowledge. If a person abstains from inquiry because he sees that the result of inquiry will probably be to show that a transaction in which he is engaging is tainted with fraud, his want of knowledge of the fraud will afford no excuse. Now, here, not only were the circumstances such (I take them of course solely from the answer) as made the inquiry natural, but they were such as made abstaining from the inquiry unnatural. The two intermediate securities stated in the bill were acceptances by the defendant at three months, and yet the bankers never applied to her at the end of the three months when the bills became due; they held one of them for above a year and a quarter after it was due, and eventually, without any communication with Mrs. Homan, took from Bowers a new promissory note by way of substitution; so that I confess the belief to which the defendant pledges her oath, that the bankers were aware of the representations made by Bowers to the defendant, seems to me to rest on very solid foundation.

[*1036]

In these circumstances, then, is it reasonable for the Court to put the defendant out of possession of her property during the progress of the cause, and while the plaintiffs are establishing their title? I cannot think that such a course would be fair and proper. The probabilities are so great that the defendant was imposed upon, that this might and ought to have been known to the plaintiffs; *and the evil to the defendant, which must be the result of taking from her, at eighty years of age, the enjoyment of all her property, in the chance that the plaintiffs may eventually make out a claim against her, is so severe that I cannot think it reasonable to deprive her of her property till the title of the plaintiffs is established by decree.

The plaintiffs here do not claim as specific appointees of any part of the defendant's separate estate. They are merely in the nature of general creditors seeking to obtain payment by a sort of equitable action of assumpsit or debt. In such a case it is a strong exercise of authority to deprive the defendant, on motion, of property on which the plaintiffs have no specific claim, in order that, if they establish their claim as creditors, there may be assets wherewith

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to satisfy them. I do not mean to say that such a course may not be taken, though I have not discovered any authority for it. Perhaps the anomalous nature of the right, where a plaintiff is claiming as a general creditor of a married woman, and is seeking payment out of her separate estate, and the inability of the Court to govern the proceedings in equity in such a case by rules strictly conformable to those which regulate an action at law, may warrant the interim interference by a receiver. But a chance of doing a wrong to the defendant in such case is certainly much greater, and much more apparent, than where a right asserted is a right against some specific fund or estate.

I may add, that in all cases where the Court summarily interferes on motion against the legal title, or the possession of the defendant, it has a right to expect the plaintiffs to proceed with the most complete and honest diligence to obtain a decree. Now here no step whatever has been taken by the plaintiffs; they are still as far as ever from a decree, though more than three years have elapsed since *the answer. I do not refer to this as a ground on which alone it would be safe to act; but in a matter which is necessarily one of discretion for the Judge, it is a circumstance not without its weight, tending as it does to the inference that the plaintiffs relied on the immediate pressure of a receiver, rather than on their chance of final success.

[*1037]

For these reasons, I think that Lord TRURO was right in discharging the order. I am aware that the grounds on which my opinion rests are not those, or not exclusively or mainly those, on which Lord TRURO relied; he did, indeed, refer to them; but, obviously, the main ground of the judgment now under appeal was, that a creditor who has given time to his principal debtor cannot effectually reserve his right against the surety, or, at all events, that the nature of the deeds and transactions in this case prevented the plaintiffs from doing so. The view which I have taken of the facts here makes it unnecessary for me to go into this question; but I should be doing wrong if I did not state, with all deference to the very able Judge whose decision is now under review, that I cannot participate in his doubts so far as relates to this general question. It may possibly be that here the giving of the bond, and the very special nature of the arrangement, may have created difficulties which have the effect of taking this case out of the general rule. On that point I give no opinion. But that a general rule exists, such as is contended for by the plaintiffs, I should, but for the high

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authority of the judgment now under appeal, have thought to be a matter beyond doubt; I should have thought, on principle as well as on authority, that it must be competent to a creditor to contract with his principal debtor to give him time, so far as he can lawfully and effectually do so without prejudicing his right against the surety. If he may do this by contract in these express terms, the question *in every case must be whether the contract, however worded, has not that meaning. I must, therefore, guard myself against being thought to acquiesce in the opinion that such a reservation against the sureties is not effectual.

My judgment, however, in this case rests on different grounds, to which I shall not again trouble your Lordships by referring; and I need hardly add that the facts at the hearing may turn out to be quite different from those which the answer represents. But in the meantime, I think it would be unjust, under the circumstances, as set forth upon this answer, to take any interim step against the property of the defendant. The course which I recommend your Lordships to take is, to dismiss the appeal, making the respondent's costs of the appeal costs in the cause.

Order appealed from affirmed, and appeal dismissed accordingly. The respondent's costs of appeal to be costs in the cause.

1854.
Feb. 9.

Lord
CRANWORTH,
L.C.

Lord St.
LEONARDS.

[1039]

MAUNSELL v. HEDGES (1).

(4 H. L. C. 1039—1064.)

[The respondents named in the report are Robert Hedges (the comma which one would expect here being omitted) Eyre White and others: hence the case is sometimes cited and indexed as *Maunsell v. White*.]

On a treaty respecting the marriage of H. M., who was believed to have considerable expectations from his uncle, H. E., the guardians of the lady desired a settlement; and H. M. addressed a letter to H. E., who answered, "I have made my will, and left you my property in the county of T., which is very considerable." The guardians still refused their consent, "until a suitable settlement shall be made by Mr. H. E. of real estate upon the marriage, in the usual course of settlement, and until the sum of 10,000*l.* shall be secured to the trustees of the estate" of the father of the lady, from whom H. M. had some time before borrowed that money, in order to become a partner in a Bank. The resolution of the trustees was communicated to H. E., who, in September, 1815, wrote, "My sentiments respecting you

(1) *Jorden v. Money* (1854) 5 H. L. C. 52 L. J. Q. B. 737; *Dashwood v. 185; Alderson v. Maddison* (1880) 5 *Jermyn* (1879) 12 Ch. D. 776; *Re Ex. D. 293, 304* (revd. 7 Q. B. Div. 174, *Pickus* [1900] 1 Ch. 331, 69 L. J. Ch. 50 L. J. Q. B. 466; 8 App. Cas. 467, 161.

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continue unalterable; however, I shall never settle part of my property out of my power while I exist; my will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never settled anything on any of my nephews, and I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made." This answer was, at the desire of H. E., communicated to the guardians, who, in March, 1816, consented to the proposed marriage, which accordingly took place in July of that year. A settlement was then drawn up, in which it was recited, that "H. M. has reason to expect that he will, upon the decease of H. E., become entitled, by virtue of the will of H. E., to a certain portion of his estate and property, pursuant to the declaration of H. E., contained in his letter to H. M. of September, 1815." H. E. was made one of the trustees of the settlement, and, about twelve months afterwards, he executed the deed; but there was no evidence that he knew anything of its contents beyond the fact that he was named as one of the trustees. H. E. afterwards devised his property to other persons:

Held, affirming the decision of the COURT below, that H. M. could not maintain a suit to compel the trustees under the will of H. E. to convey the Tipperary estate to him, for that H. E.'s letters did not amount to a contract to settle it on him.

THE appellants instituted a suit in the Court of Chancery in Ireland, for the purpose of having certain estates in the county of Tipperary, the property of the late Robert Hedges Eyre, conveyed to the uses of the settlement made on their marriage.

[1040]

Mr. Eyre was a bachelor, and had no surviving brother, but he had two sisters, one of whom had married the father of the present Earl of Bantry, and the other had married George Maunsell, Esq. The appellant was one of the children of Mr. George Maunsell, and had been in the army, had quitted it, and, in September, 1814, became a partner in a Bank at Limerick. The chief partner had, nearly up to that time, been a Mr. Thomas Maunsell (an uncle of the male appellant), who had lent the appellant the sum of 10,000*l.*, which (with some other money) the appellant had paid in as his share in the capital in the Bank, and to secure the repayment of which, he gave a bond to his uncle. The different members of the family had settled among themselves how the property of the bachelor uncle (which was very considerable) was to be divided, and the appellant was considered to be likely to obtain possession of certain estates in the county of Tipperary.

The other appellant, Elizabeth Dorothea Maunsell, was then a minor under the age of sixteen. She was the daughter of Thomas Maunsell (then recently deceased), and was entitled, under the will of her father, to a moiety of his estates, which were of considerable value, and under the control of four guardians, who were her

MAUNSELL mother Dorothea Grace Maunsell, her uncle Robert Maunsell, and
HEDGES, William Gabbett and Francis Gore. The appellant, her cousin,
Robert Hedges Maunsell, made her an offer of marriage.

[*1041] Some correspondence took place between the appellant and Mr. Eyre relative to the condition in life of the *former, and to his project of marriage. The appellant wanted Mr. Eyre's assistance, in order to be able to make a settlement which would be satisfactory to the guardians of the young lady. On the letters written by Mr. Eyre the appellant's claim was founded. On the 19th September, 1814, Mr. Eyre wrote, "I should wish much to pay my respects to your good aunt and her fair daughters, which I intend doing as soon as possible. I am anxious to know the person you are so much interested about. I sincerely hope to see you both happy, which, from my knowledge of you and her character, admits of little doubt. I have made my will, and left you my property in the county of Tipperary, which is very considerable; Richard knows the situation of it."

Again, on the 27th October, 1814, Mr. Eyre wrote, "My sentiments continue unalterable respecting your banking speculations; I am sincerely sorry that you ever embarked in them; you are now committed, and must get out of the scrape as well as you can. There cannot be a stronger proof of your aunt's and fair cousin's esteem for you than their sentiments expressed on the late unpleasant business. I sincerely hope that nothing may occur to prevent so desirable a union; it is incumbent on you to pay them every attention."

[*1042] On the 9th December, 1814, Mr. Eyre wrote, "I do, I have, and ever shall disapprove of your being concerned in banking business; therefore be assured that I did not go security by way of any encouragement to you to persevere in that line; however, I wish every success to your new firm." "I think you stand every chance of being very happy in the matrimonial way, should you be united to the young lady you mention. The education she has received in my mind is more likely to make her a good wife and an agreeable companion, than if she had been more in the world; a year and a half is a great while to *wait, and many changes may take place before then; be not too sanguine, lest something may interfere to disappoint your wishes."

On the 17th of August, 1815, Mr. Eyre wrote, "I am not at all surprised at what you tell me respecting your uncle Maunsell (Robert Maunsell, one of the guardians); he has acted in the most

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unkind and selfish manner; he cannot have the interest of the young lady at heart; he must have some one of his own children in view to possess her property, without being interested for her good qualities. If the young lady and her mother feel disposed to make you happy, I do not see how he can prevent it; he cannot have any objection to you, and as for her property, I hope that you will hereafter be fully entitled to it." These letters (together with others of a similar kind) were regularly communicated to the guardians, who held various meetings on the subject of the proposed marriage.

On the 30th August, 1815, the two guardians, Gabbett and Gore, signed a memorandum in the following words: "At a meeting this day, we think it right to state to Mrs. Maunsell that, under all the circumstances, our opinion is, that until Miss Maunsell attains the age of 17 years, and until a suitable settlement shall be then made by Mr. Hedges (Eyre) of real estate upon the marriage in the usual course of settlement, and until the sum of 10,000*l.* shall be secured to the trustees of the estate named in the late Mr. Maunsell's will, being the sum lent to Mr. Robert Hedges Maunsell on his bond, dated 1st July, 1814, it would not be advisable that a marriage should take place; and unless Miss Maunsell shall, on her attaining the age of 17, retain the same sentiments respecting Mr. Robert Hedges Maunsell as she now does, we think no union ought to take place." Robert Maunsell, the other guardian, at the foot thereof wrote and signed a memorandum in the following words: "Having given an opinion *on the subject, in writing, to Mrs. Maunsell, that 18 should be the age for marriage, I now accede to the age of 17, as it appears to be the particular wish of Mrs. Maunsell, provided the 10,000*l.* lent to Robert Hedges Maunsell is well secured to the satisfaction of the trustees, Robert Maunsell and William Gabbett, as also that a proper settlement shall be made for Miss Elizabeth Dorothea Maunsell before the marriage takes place."

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The appellant hereupon again applied to Mr. Eyre, who, on the 4th September, 1815, wrote a letter in the following words, viz.: "MY DEAR ROBERT,—My sentiments respecting you continue unalterable; however, I shall never settle any part of my property out of my power, so long as I exist; my will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I have mentioned before, and I again repeat, that my county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place. I have never

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settled anything on any of my nephews, and I should give cause for jealousy if I was to deviate in this instance from a resolution I have long made. Be assured that nothing would give me more pleasure than to hear of your union with the object of your fondest wishes, and I should be concerned that the resolution I have made should retard your happiness; however, I hope you will give me credit in believing that I am only actuated by the motive I before mentioned—that of avoiding all jealousy that the rest of my family might feel had I complied with the wishes of the young lady's guardians. I will thank you to communicate the subject of this letter in answer to one I have received from them. In all matters of this sort everything should be carried on in the most candid and explicit manner."

[*1044]

On the 26th March, 1816, Mrs. Maunsell, William Gabbett, and Francis Gore signed a memorandum in the *following words: "At a meeting of the guardians of Miss Elizabeth Maunsell, held this day, we, the undernamed, having reconsidered the circumstances relative to the proposed union between Mr. Robert Hedges Maunsell and Miss Elizabeth Maunsell, and finding that Miss Maunsell's attachment to him continues permanent, and that her affections are strongly engaged, and that she is on the point shortly of attaining her age of 17 years, hereby signify and declare our consent to the proposed union taking place on her attaining her age of 17 years, we at the same time finding that Mr. Robert Hedges (Eyre), uncle to the said Robert, has declined making any immediate settlement upon him, although it appears from the letter of Mr. Robert Hedges, that he has devised a considerable real estate to his said nephew by will, and that the said Mr. Hedges has expressed sentiments of strong affection towards his nephew. We also declare that we deem it necessary that, previous to the proposed union taking place, Miss Maunsell's fortune should be settled in such a manner upon her and her issue as to preclude the possibility of her fortune being in any way affected by any contingency, or embarrassment, or failure that may hereafter occur to the Bank in which the said Robert Hedges Maunsell is now engaged at Limerick as a partner." And Robert Maunsell, at the foot thereof, wrote and signed a memorandum in the following words: "I consider the question now agreed on by the majority should not have been decided on, unless a security shall be passed for the 10,000*l.* lent to Robert Hedges Maunsell, as agreed upon by the guardians, 30th September, last year, and that security to be null and void, in case the Lord Chancellor shall

declare the said Robert Hedges Maunsell is entitled to the 10,000*l.*, and order the bond to be delivered up to him."

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On the 9th April, 1816, Mr. Eyre wrote to the appellant, "You must have been surprised at my not having *answered your letter long since. I can assure you that nothing but extreme bad health could have prevented my writing to you, to say how happy I am to hear that all matters have terminated to your satisfaction. I cannot account for Mr. Robert Maunsell's conduct; he could only be actuated by self-interest, as your future prospects fully entitle you to every consideration. If I find myself strong in a few weeks, it is my intention to pay you a visit; and I long much to see my intended niece, and I sincerely hope you may both experience every happiness."

[*1045]

The appellant applied to Mr. Eyre to become one of the trustees of the settlement to be made upon the marriage; and on the 3rd June, 1816, Mr. Eyre wrote to the appellant as follows: "You may be assured that nothing could give me greater pleasure than to comply with any wish of yours, and will act as a trustee in the instance you mention. I am glad that this event is so near a conclusion. I sincerely wish you both every happiness. I have been delayed here longer than I intended or wished: however, I hope in a few days to be able to set off on my travels. If I can do anything for the ladies at Plassy, command me. You will make my best wishes to them."

The settlement upon the intended marriage bore date the 16th July, 1816, and was expressed to be made between the appellant R. H. Maunsell, of the first part, Dorothea Grace Maunsell and Elizabeth D. Maunsell of the second part, William Gabbett and Francis Gore of the third part, Richard Maunsell and Joseph Gabbett of the fourth part, and Robert Hedges Eyre and Francis Gore of the fifth part. The property of the appellant Elizabeth D. Maunsell was settled by it strictly upon trust as to real estate, and the settlement contained a recital in the following words: "And whereas the said Robert Hedges Maunsell has reason to expect that he will, upon the decease of Robert Hedges Eyre, Esquire, his uncle, become entitled *by virtue of the will of his said uncle to a certain portion of his estate and property, pursuant to the declaration of the said Robert Hedges Eyre, contained in his letter to the said Robert Hedges Maunsell, bearing date the 4th day of September, 1815." And it also contained a covenant on the part of the appellant, that "such estate and property, real and

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personal, as he should become entitled to by deed, will, or devise, of and from the said Robert Hedges Eyre, should, so far as the appellant Robert Hedges Maunsell should have such estate or interest therein, or power in respect thereto, as should enable or authorise him to make the limitations thereafter set forth, stand limited in trust ;" and then certain trusts for the intended wife were set out.

The settlement was executed at that time by all the parties thereto, except Mr. Eyre. The marriage took place on the 20th July, 1816. Mr. Eyre was not called upon to execute the settlement till long after the marriage ; and when asked to do so, did it at once ; but there was no evidence to show that it was read over to him. * * *

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In February, 1838, Mr. Eyre executed another will, to which, in February and November, 1837, and in April, 1838, he added codicils. In September, 1838, he made his last will, to which, in January, February, and May, 1840, he added codicils, but in no one of these various documents did he make any devise or bequest in favour of either of the appellants, or of the issue of their marriage. Mr. Eyre died in June, 1840.

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In August, 1841, the appellants filed their bill in the Court of Chancery in Ireland, setting forth the facts of the negotiations respecting their marriage, and the letters of Mr. Eyre written thereupon, and alleging that the Tipperary estates *were bound by such letters, which constituted a contract or engagement entered into by the said Robert Hedges Eyre, and by the trusts declared in the marriage settlement, and that Eyre had no power otherwise to dispose of the said estates, and charging that the promise or undertaking contained in the letter of the 4th of September, 1815, was irrevocable, and that the object of Eyre in introducing the words, " unless some unforeseen occurrence should take place," was to provide against anything which might incapacitate him from performing the said undertaking ; and the bill prayed that the appellants might be declared entitled to a conveyance of the said estates, and for an account and a receiver, and for general relief. The respondents (who were the trustees and devisees of Mr. Eyre) put in their answers, to which a replication was filed. Evidence was taken, and the cause came on for hearing before Sir E. Sugden, the Lord Chancellor of Ireland, on the 1st and 2nd of July, 1844, when his Lordship dismissed the bill, with costs. This appeal was then brought.

The *Solicitor-General* (Sir R. Bethell) and Mr. Glasse for the appellants :

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The letter of the 4th September, 1815, if not an actual contract, was an engagement binding on Mr. Eyre. [It was regarded by all concerned as a promise ; as a promise it was introduced into the settlement, and the marriage took place in consequence of it. They cited *Luders v. Anstey* (1) and *Hammersley v. De Biel* (2).]

(LORD ST. LEONARDS : Was it merely a representation in *Hammersley v. De Biel* ? Was it not a proposal, with a condition which, being accepted, was equivalent to a contract ?)

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If so, it was not a contract in the usual sense of that term ; it was only an engagement by one party on which another acted ; it is so here ; this was a proposal which, being accepted, was equivalent to a contract ; and it is impossible to establish any distinction between the two cases.

Mr. Rolt and Mr. Willcock, for the respondents, were stopped.

THE LORD CHANCELLOR :

[1052]

In this case a bill was filed by the appellant for the purpose of compelling the parties claiming under the will of Mr. Robert Hedges Eyre to settle his real estates in Tipperary on the appellant, pursuant to an alleged obligation arising on certain letters written by Mr. Eyre on the occasion of the negotiations for the appellant's marriage. It is supposed that your Lordships are bound to come to a conclusion in favour of the appellant by reason of a decision of this House in the case of *Hammersley v. De Biel* (3). Considering the extreme importance of treating decisions of this House on points of law as absolutely conclusive, if this case did appear to me to be governed by that of *Hammersley v. De Biel*, whether I thought that decision right or wrong, I should propose to your Lordships to come to a conclusion in conformity with it. But this case, in all its main features, is, I think, distinguishable from that of *Hammersley v. De Biel* ; and if your Lordships were to reverse the decision of the Court below, you would not be acting in conformity with the prior decision, but against it ; you would be forcing parties who had not only not engaged, but who had

(1) 4 R. R. 276 (4 Ves. 501).

(2) 69 R. R. 18 (3 Beav. 469).

(3) 69 R. R. 18 (12 Cl. & Fin. 45).

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studiously and laboriously stipulated that they would never do so, into performing something which they had carefully sought to avoid, nay had stipulated that they should never be called on to perform. What are the circumstances of this case? The appellant paid his addresses to his cousin; he had an uncle, an old bachelor, with a large property; he himself had but little money; the guardians of the young lady were opposed to the marriage unless he could make a good settlement in her favour; and under these circumstances, having received kindnesses from his uncle, and believing that his uncle was *willing to befriend him, he addresses a letter to the uncle, who says, in answer, that he is glad to see that his nephew (the appellant) is about to be well married, and that he has left his Tipperary property to the appellant. That was a very vague answer; and the trustees and guardians of the young lady wished for a more specific declaration. We have not the letter which was written to Mr. Eyre communicating to him this wish of the trustees, but we have what is more material, the answer which he made to that communication. On that answer the whole case rests. What is that answer? It is in the following terms. (See *ante*, p. 535.)

The first sentence of this letter expresses the resolution of the writer: "I shall never settle any part of my property out of my power so long as I exist." Nothing can be clearer or more strongly expressed than this resolution. I think the attempt afterwards to spell out of this letter a representation which is to be construed into an engagement or a contract, is altogether unsatisfactory. To say that in this same letter in which this sentence is to be found, the party writing it binds himself to make a settlement of his property when he merely says that the Tipperary estates will come into his nephew's possession after his death, "unless some unforeseen occurrence should take place," does seem to me to be an attempt to put a construction on words which their natural meaning will by no means warrant. Then Mr. Eyre, the uncle, says, "my will has been made for some time," a fact which we must assume to be true, and which is itself an answer to the application to make at that time a settlement in the nephew's favour. I must assume the statement to be true; there is no evidence to the contrary, and the circumstances of the case go to show that the statement was true. Then the uncle goes on: "I am confident I shall never *alter it to your disadvantage; and I repeat, that my Tipperary estates will come to you at my death, unless some

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unforeseen occurrence should take place." What does that mean? He does not fetter himself; he says in substance, "I am now on good terms with you; I will not bind myself to do what the trustees ask; I have made my will, and that will remain as it is, unless some unforeseen occurrence should happen." This is all he says. Is or is not that a fair construction of the words of the letter thus written as an answer to an application to him to consent to make a settlement? The lady continued attached to her cousin, and the marriage, with the consent of the guardians, took place, they thinking, as they say, that the letter was equivalent to a contract by the uncle to give the nephew the Tipperary estates. I do not think that to be a legitimate inference from the letter; nor do the facts warrant the statement of the inference. That letter was written on the 4th of September, 1815. The trustees objected to the marriage; they discussed the youth of the lady, and other circumstances; and the marriage did not, in fact, take place till nearly 12 months afterwards, namely, towards the end of July in the following year.

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If the parties really meant to say that they relied on this letter as a contract, I think that common honesty required that they should distinctly have brought that circumstance to the uncle's knowledge. They should have said, "What is it that you mean? is this intended as a promise which is to be binding upon you, or is it merely an expression of kindness and good-will?" They do nothing of the sort; but after some time they proceed to make a settlement; and then what do the young man and the guardians of the young lady agree to? He covenants that he will settle this property if he gets it; and they accept that covenant. Of course, all that he could do was to undertake to settle *whatever he might afterwards receive under this letter; he did so covenant, and they took that covenant.

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In *Hammersley v. De Biel* it was successfully insisted that there was a contract to leave a sum of money; but the *Solicitor-General*, in arguing this case at your Lordships' Bar, does not go that length; his contention is, that there was a representation on which the parties acted. He has treated the rule of law as affecting representations as distinct from the rule of law which affects contracts; but still he says that where a party makes a representation, and others act upon it, such representation amounts to an engagement, and the acting upon it makes it binding as a contract. By what words are you to define whether a party has entered into

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an engagement as distinct from a contract, but which becomes a contract by another person acting upon it? Where a man engages to do a particular thing, he must do it; that is a contract; but where there are no direct words of contract, the question must be, what has he done? He has made a contract, or he has not; in the former case he must fulfil his contract; in the latter there is nothing that he is bound to fulfil. A representation may be so made as to constitute the ground of a contract. But is it so here? Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act on it, equity will bind him by such representation, treating it as a contract. Suppose that this gentleman had on the eve of the marriage said to the appellant, "You may safely enter into this marriage, for I have executed a deed by which I engage to leave you such and such estates." If on the faith of that representation the nephew had married, the uncle would then have made a representation on which *he knew that the nephew would act, and it would be a fraud on the nephew, or on those who dealt with him, and came after him, to set up as an answer that that was a mere intention which he had entertained at the time. The uncle would, in fact, have made a contract, and he would be compelled to make it good, for he would have made a representation with a view to induce others to act upon it, and on the faith of it they had, at the moment, acted. That would be a representation which, under the circumstances I have stated, would be in fact a contract. There is no middle term, no *tertium quid* between a representation so made to be effective for such a purpose and being effective for it, and a contract: they are identical. That which leads to the representation being made and acted on, determines its nature, gives it the character of a contract, or leaves it a mere representation. I must say that no such distinction as the argument for the appellants supposes, can exist in law or in principle; and though you see the word "representation" used as it is in the speech of the noble and learned Lord who decided *Hammersley v. De Biel* in the Court of Chancery, I cannot think that it was meant to bear the construction now attributed to it, and to raise any such distinction as is now relied on. That word is no part of the judgment. I must say that I do not think it is a word very happily employed. The only distinction I understand is this, that some

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words which would not amount to a contract in one transaction may possibly be held to do so in another. Thus in *Hammersley v. De Biel*, if Mr. Thomson had said, "I propose at this moment to pay down 10,000*l.*, and at another time if no unforeseen occurrence should take place to pay 10,000*l.* more," that would not have been a contract at all; but, when he, being the father of the lady, went further, and wrote on the occasion of the contract of marriage being *entered into, "I will pay down 10,000*l.*, and further, I intend to leave her 10,000*l.* more, which sum is to be settled upon her in a particular way, and the person about to marry her is for these reasons to settle 500*l.* a year on her," and that party did make that settlement, and then married the lady: the circumstances there gave to the words used the character of a contract which equity was bound to enforce. A contract cannot be at large; it cannot be unilateral; it cannot be performed on one side, and left unperformed on the other: a court of equity will not allow that. Am I right in saying that that was the principle on which the Court of Chancery first, and then this House acted in *Hammersley v. De Biel*? Lord BROUGHAM in express terms states that principle, affirming in that way what had been previously stated by the MASTER OF THE ROLLS. The noble and learned Lord (1) said, "I am clearly of opinion with the MASTER OF THE ROLLS, and I concur in what he states on the subject of the words in the letter, 'subject, of course, to revision,' and which is stated by him so clearly, that I prefer his language to my own. He says most accurately (2), 'Until Baron De Biel had performed his part, and prior to the marriage, the whole was to be subject to revision; but no revision took place. The proposals and intention thus expressed remained without any alteration whatever up to the time of the marriage, and I am of opinion' (in which I entirely agree) 'that the proposal, which up to that time had been subject to revision, did then, by the acceptance of the Baron De Biel, by his due execution of the required settlement on his part, and by the solemnization of the marriage, with the approbation of Mr. Thomson, become an agreement (according to all the cases), which Mr. Thomson was bound specifically to *perform.'" That is the principle on which the case of *Hammersley v. De Biel* was decided.

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The House of Lords held in that case, that though the wording of the letter was a proposal reduced into writing, the proposal to

(1) 89 R. R. see p. 40 (12 Cl. & Fin. (2) 69 R. R. see p. 27 (3 Beav. 478). 83).

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give and to intend to leave, that that really meant an agreement to this effect: "If you will settle 500*l.* a year, and marry, I will give 10,000*l.* now, and 10,000*l.* by my will." If, therefore, *Hammersley v. De Biel* had been wrongly decided, which I do not even insinuate, for I do not think that it was, it did not lay down a principle which would govern this case; for this is not a case in which the parties entered into an arrangement in the sense there spoken of, namely, an arrangement that on a given state of things happening, on certain acts being done by one party, the other would undertake to do something else; but, on the contrary, the uncle's representation here was, that he would not bind himself to do anything; that, having made his will, he had by that will given to his nephew certain estates in Tipperary; that he did not then see the least chance that he should alter his will, but still that he meant to reserve his power of doing so if any unforeseen circumstance should occur. How does such a case resemble that of *Hammersley v. De Biel*, or how does such a letter constitute a contract to do a particular thing, a contract to be enforced against the representatives of the writer of it?

I conceive that monstrous consequences would arise from our adopting the construction now contended for. This gentleman, who cautiously insisted on reserving to himself power while he "existed," is now argued to have given up his power, and that too by the very letter in which he made the reservation. If that had been so, what would have been the consequence? He never, if this had been a binding contract, would have had the power to sell *or mortgage an acre of land in Tipperary; and it was a binding contract, or it was nothing at all.

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I have, my Lords, taken this short and general view of the case, because I think it depends on plain circumstances, and plain rules of construction. With respect to the earlier cases from Vernon and Vesey, I do not think that they carry the argument any further. They show circumstances which amounted to a contract, and proceed exactly on the same principle on which this House acted in *Hammersley v. De Biel*, but none of them furnishes any authority for this appeal.

This case must be decided on the short principle that there never was any engagement whatever on the part of the uncle that he would bind himself to leave this property to the nephew. I do not know of anything which can be construed into an engagement. There is no representation, there is no statement of anything

which was not true. All that the uncle meant was, that his present intention was to leave the property to his nephew; but he would not bind himself; he reserved the whole within his own power up to the time of his death. The court of equity had, therefore, no more right to make good this as an undertaking or a contract, than it would have to deal with the property of any other person who had not entered into any engagement at all. Without calling on the other side, I am of opinion that the decree of the Court below should be affirmed, and I move that it be affirmed accordingly.

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LORD ST. LEONARDS:

My Lords, this is a case in which I cannot entertain any doubt whatever. It is not my intention to go into the general question of equity. I do not dispute the general principle, that what is called a representation, which is made as an inducement for another *to act upon it, and is followed by his acting upon it, will, especially in such a case as marriage, be deemed to be a contract. If a party will hold out a representation as a condition on which a marriage may take place, and the marriage does take place upon it, he must give effect to that representation. But when we come to the case of *Hammersley v. De Biel*, decided in this House (1), and we are told that we must be governed by it in the decision of the present case, we look at it, and find that there was not merely a representation of what was probable to occur, but that there was on one part a proposal, accompanied with a condition required of the other party, that that proposal was accepted, that that condition was complied with, and that there were therefore all the requisites of a binding contract. If a man makes a proposal in that manner, and it is accepted, and is followed by a marriage, though the affair may have begun by being a proposal, it has ended by becoming a contract that was binding on all the parties concerned. Here there was a simple representation. Mr. Eyre, on being applied to, represented that he had made a will; not made it with a view to this marriage, but made it long before the marriage was contemplated; such a marriage, therefore, could have no influence on a will which was already made. He made what was no doubt at the time a true representation of what he had done, and what he intended. It is argued upon as having been an inducement to the marriage. Perhaps the parties did act upon it. They trusted that a man who stood in the relation which Mr. Eyre did to the appellant would do

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(1) 69 R. B. 18 (12 Cl. & Fin. 45).

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all that he said was probable; they believed, as he did at that time, that he was not likely to alter his will. That would, of course, be a representation on which they would act. But how? Not as on an engagement made which could *not be revoked, but as on a statement made by a relation whose affection, if it remained what it then was, would give the nephew the property in accordance with that statement. That the representation was an inducement to the marriage I am not disposed entirely to deny; but it was so only in the way I have stated. If the doctrine contended for by the appellant was true, the uncle by that representation became a mere tenant for life, without the powers of a tenant for life over his own estate. I hold it to be clear that he made no representation which could have any such effect. His will was already made, and he said it was not likely to be revoked; but the guardians of the lady, and she herself, knew perfectly well that the uncle reserved the power of revocation. They acted on a mere representation which was all that was made. The letter of September, 1815, not only was not acted on, but it was repudiated by the guardians. That is shown by the resolution of the guardians made long after that letter was written. They said, in their resolution of the 30th August, 1815, that, under all the circumstances, the lady should wait till she was seventeen years of age, till the "usual course of settlement" could be adopted, and till the 10,000*l.* of the intended husband's property could be secured to her. They very distinctly made these two stipulations: that is plain. What was the answer to that? They instantly communicated that resolution to Mr. Eyre. We know that they did so, though we have not the letter in which they made the communication; but we know from Mr. Eyre's letter in answer, that he had received the communication from them. What was the answer to that resolution? The answer was, that he would not make any settlement whatever. He distinctly said that he would not give up his power over his property "so long as I exist." There is not one word in all the letters of Mr. *Eyre which shows that any circumstances would induce him to make a settlement that would deprive him of his power over his estates. There was a clear demand made upon him for a settlement of real estate in the usual course of settlement, and for relieving the nephew from the liability to the 10,000*l.* There was as clear a refusal on his part to do either. Does he do either? There is a settlement executed, but it is a settlement of her property. Is there any settlement attempted to

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be made of the proposed property which he is said to have bound himself to settle? None at all. The parties did not attempt to include the estate in the settlement. What they did was, after the settlement of her property, to introduce a recital to the effect that Major Maunsell had reason to expect that some property would be left to him by his uncle: but afterwards the words, "pursuant to the declaration of Robert Hedges Eyre, contained in his letter to Robert Hedges Maunsell, bearing date the 4th of September, 1815," were improperly introduced. These words had not been there at first. When the deed came to be executed, though Mr. Eyre had consented to be a party to the trust, they left the recital as it was; and it is to be observed, that Mr. Eyre did not execute it till twelve months afterwards. But in this recital as it stands, what do they say? Why, merely that Maunsell had reason to expect from his uncle this estate, treating his uncle as if he was not in any way a party to the deed at all. But we have been pressed with arguments to show that the uncle's refusal does not bear the meaning which the language imported; yet what else could it mean but this, "I tell you I do not intend to alter my will, but circumstances may arise to make me do so"? Now, circumstances did arise which determined him to make the alteration. What else was he to do than to act on those circumstances? *Was he bound to go to the family, and ask their leave to revoke his will? Certainly not; and the only reason why evidence was admitted on this point was to show that a change of circumstances had arisen, and that no fraud had been committed. These circumstances were in his own breast sufficient to justify the alteration of the will, and he was the person to decide whether they were sufficient or not. He had always had an objection to the banking business in which his nephew was engaged; he had before said, that he did not and never should approve of it; and then he had become surety for the nephew, and, as such, had been called on to pay a considerable sum of money. He was surety too in a second matter, and there likewise he was called on to pay; and the nephew had induced him to buy an estate, with a view to increase his interest in the county, and that purchase had turned out calamitous; he was a loser of thousands of pounds by the injudicious advice of his nephew, and he might well fear that if he left his property to that nephew, that property would soon be swallowed up. He thought he had good reason to alter his will. But it is said that though he did not comply with the wishes of the family, he gave the strongest reason

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to believe that he intended to do all that was desired, though not to do it at that time, and that he made the members of the family believe that he would allow the will to remain as it was, and would not give the property to any one else. But this is not all : another ground of setting up this claim is, that the guardians in their resolution say, that no marriage could take place till the 10,000*l.* had been assured ; yet that was not done, and still the marriage did take place ; so I say it is clear that the representations of the uncle did not bring about the marriage, but that his representations were perfectly understood in the sense in which *he made them, and in which they must be understood in a court of justice.

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The settlement was originally prepared without introducing Eyre as a party : he never was a party, except as a trustee, and he never received the slightest notice that he was required to be more than a trustee. The mere circumstance of his being a trustee did not necessarily give him an acquaintance with the deed, so as to make him possess a knowledge of its contents ; there was no proof that it was read over to him ; but if it had been, there is nothing on the face of the deed to show that the other parties thought of it differently from what he himself did. Then, what was the covenant in the deed ? The intended husband covenanted, that whatever property, by deed, will, or otherwise, under his uncle's favour, should come to him, he would settle it on the lady ; but all this interest is put as conjectural and contingent. I am clearly of opinion, that the parties perfectly understood that the uncle rejected the proposed settlement ; that he reserved to himself full power to revoke the will he had made ; and we know that he did afterwards exercise that power of revocation. I entirely concur with my noble and learned friend, and I think the case so clear, that, in my opinion, the appeal ought to be dismissed, with costs.

Decree below affirmed ; and appeal dismissed, with costs.

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(4 H. L. C. 1065—1088 ; S. C. 18 Jur. 755.)

1854.
March 3, 6,
13.
—
Lord
CRANWORTH,
L. C.
Lord St.
LEONARDS.
Lord
BROUGHAM.
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J. S. under his marriage settlement was seised of certain estates in the county of Clare, for life, remainder to his sons successively in tail, subject to a charge of 5,000*l.* as a provision for younger children. B. S. was the eldest son of this marriage, W. S. another son, and there was a daughter, Diana. J. S. afterwards purchased other estates, one of which was called K., which in 1806 he conveyed by way of mortgage security to the Bishop

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of Elphin. In February, 1807, he executed a deed, by which, assuming to be the owner in fee of K., he conveyed it and other lands to trustees for himself for life, then to his eldest son B. S. for life, remainder to the eldest and other sons of B. S. successively in tail. This deed contained a covenant on the part of B. S. to pay J. S.'s debts, and to discharge a sum of 2,000*l.* which J. S. had undertaken to pay to two children of Diana; and also an assignment by J. S. of his personal estate in favour of B. S., who was thereby appointed the attorney of J. S., with power to call in the debts due to him. The deed was registered (apparently without the knowledge of J. S. or of W. S.) upon the 1st June, 1807. On the 13th June, 1807, by a deed, to which J. S., B. S., two trustees, and W. S. were parties, J. S. granted and B. S. confirmed to the trustees the lands of K. to J. S. for life, then to W. S. for life, remainder to his first and other sons in tail, with a power to each succeeding tenant for life to charge the same with a jointure for his wife; and by the same deed W. S. gave up his share of any benefit from the provision for younger children under his father's marriage settlement or otherwise. This deed was registered a few days afterwards. J. S. died in November, 1808, and W. S. entered into possession of the lands of K. W. S. married in 1815, and B. S. was a party to his marriage settlement, in which the lands of K. were included, and by which, under the power contained in the deed of June, 1807, W. S. created a jointure for his wife. B. S. paid his father's debts, satisfied the mortgage on the lands of K., obtained a reconveyance of them to himself, and died in 1837, having allowed W. S. to remain in undisturbed possession up to that time. W. S. continued in possession and died in 1843. The son of B. S., claiming under the deed of February, 1807, brought ejectment against the son of W. S., who relied on the deed of June for his title. At a trial of this ejectment, the jury found that the deed of February, 1807, was a voluntary deed, and that that of June, 1807, was given for a valuable consideration. The Court of Queen's Bench in Ireland directed a *new trial, which took place, but the defendant did not appear, and the plaintiff obtained judgment against him by default. A bill was filed by the plaintiff in the Court of Chancery in Ireland to have the trusts of the deed of February, 1807, carried into execution, and that Court decreed accordingly:

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Held that the decree was right; that after what had occurred at law it must be assumed that the deed of February, 1807, was given for a valuable consideration, and that the deed of June, 1807, was a voluntary deed; and further that the subsequent marriage of W. S., and the circumstances attending it, did not constitute his children purchasers for value under the latter deed, which could not prevail against an earlier and a previously registered deed that had been executed for a valuable consideration.

JOHN SCOTT the elder, the grandfather of the parties to the suit, was seised of an estate for life (with remainder to his first and other sons in tail male) of certain lands at Cahiracon, in the county of Clare, under the limitations of a settlement made on his marriage with Miss Bindon, and dated in April, 1763, subject to a charge of 5,000*l.* for the younger children of the marriage, to be divided amongst them in such shares as he should by deed or will appoint. There were seven children born of this marriage, Bindon Scott (the father of the respondent), John, Nicholas, Richard (who died under age), Robert, William (the father of the appellant), and a daughter,

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Diana, who became the wife of Boyle Vandeleur, Esq. In the year 1800 John Scott the elder purchased for 9,900*l.*, the lands of Knoppogue, Masnery Lane, Crevagh, Carrowgare, and other lands in the county of Clare, and they were duly conveyed to him by an indenture dated 19th December, 1800. On the 18th March, 1806, he mortgaged all these newly purchased lands to the Bishop of Elphin, to secure repayment of a sum of 5,000*l.*, with interest at six per cent., and gave a warrant of attorney as a collateral security. On the marriage of Diana Scott to Boyle *Vandeleur, the sum of 3,000*l.*, part of the 5,000*l.* charged on the settled estates, was raised out of those estates and was paid over to the husband.

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On the 11th August, 1806, John Scott the elder, in part advancement in life of his youngest son William, by deed, to which himself and William were the two parties, conveyed to William in fee certain lands called Dromfinglass or Cragmoher, worth about 300*l.* a year.

By an indenture, dated 28th February, 1807, made between John Scott, of the first part, Bindon Scott, therein described as his eldest son and heir, of the second part, and John Percy and Samuel Spaight, of the third part, reciting the marriage settlement of John Scott, and that his son Bindon Scott was under that settlement tenant in tail of the settled lands; that John Scott had since purchased the lands of Crevagh, and that he had lately, without any pecuniary consideration, and as his free gift, conveyed the said lands (then of the yearly value of 800*l.*) in reversion after his own decease to his son John Scott the younger; and that he had since his marriage acquired the lands of Cragmoher (of the value of 300*l.* per annum), and that he had, in like manner, conveyed them to his son William Scott, and reciting the payment of the 3,000*l.* on the marriage of Diana Scott, and an agreement to charge his unsettled real estates with a sum of 2,000*l.* for the two daughters of that marriage; which said gifts, conveyances, and agreements were to be in full of the shares of the said John, William, and Diana, under their father's marriage settlement, and of any devise, &c.; and further reciting that John Scott the elder had likewise acquired the lands of Knoppogue, Masnery Lane, and others, and was possessed of personal estate to a large amount, all which he was then minded to convey to his eldest son Bindon Scott, for the considerations, &c. thereinafter *expressed, that is to say, that Bindon Scott should undertake the payment of all the debts of his father; that all the lands previously undisposed of (subject to the charge of 2,000*l.* to

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the daughters of Vandeleur) should be conveyed (as therein described); and that Bindon Scott should call in all the personalty, &c.: It was witnessed, that John Scott the elder, in consideration of natural love, &c., and also of the covenants and agreements therein contained on the part of Bindon Scott, granted, &c., unto Percy and Spaight the lands of Knoppogue, Masnery Lane, and other lands therein mentioned, situated in the county of Clare, to hold upon the trusts thereinbefore mentioned, to the use of John Scott for life, and after his decease to his eldest son Bindon Scott for life, remainder to trustees, remainder to the first and other sons of Bindon Scott in tail male; and John Scott assigned all his personal estate (of which, however, no schedule was attached to the deed) to Bindon Scott, for his own use and benefit, and appointed Bindon his attorney, to call in his personal estate. The deed then provided that nothing therein contained should prevent John Scott from calling in, recovering, releasing, &c. the same, as fully as he, his executors or administrators, could do, nor to prevent him from recovering, &c. during his life the arrears of rent out of the lands and premises that now were or thereafter might be in his possession. Bindon Scott covenanted, in consideration of the release and assignment, that he would pay all the debts of John Scott, and save him harmless from all costs. This deed was executed on the day it bore date, and was registered on the 1st of June, 1807.

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Some discussions as to this deed appeared to have taken place among the members of the family, and instructions for a fresh deed were laid before Mr. Burton, in consequence of which two deeds were prepared, dated respectively the 12th and 13th June, 1807.

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To the deed of the 12th of June, 1807, John Scott the elder, Bindon Scott, William Scott, and Percy and Spaight were severally parties: it contained all the recitals made in the previous deed of the 28th February, but did not in *terms refer to that deed. John Scott, in consideration of love and affection, and of the covenants therein contained by Bindon Scott, granted, released, &c.; and William Scott confirmed unto Percy and Spaight all the lands contained in the deed of February (except the lands of Knoppogue) to the use of John Scott for life, then to Bindon Scott, remainder to his heirs in tail male. The assignment of personalty was then repeated. Another deed was executed on the 13th June, 1807, to which the same persons were parties, for making a further provision for William Scott, whereby, in addition to the lands of Cragmoher,

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John Scott released, &c., and Bindon ratified and confirmed to the trustees the lands of Knoppogue to John Scott for life, then to William for life, with remainder to his heirs in tail male, with a power to every tenant for life in possession to charge the same with a jointure of 200*l.* a year, and a covenant by John Scott the elder and by Bindon for quiet enjoyment; and it was thereby declared that such conveyance was in satisfaction of all the claims whatever of William as to real or personal estate under any settlement or otherwise.

John Scott the elder died on the 22nd November, 1808, leaving his two sons, Bindon Scott the eldest, and William Scott the youngest, him surviving. On his death, William Scott entered into possession of the lands of Knoppogue, claiming to be entitled thereto under the deed of 13th June, 1807. Bindon Scott married in 1810, and the respondent was his only son and heir. Bindon Scott paid off the mortgage to the Bishop of Elphin, and on 21st September, 1811, obtained a reconveyance of the mortgaged premises: he also, in performance of the covenants in the deed of 28th February, 1807, paid the debts owing by his father, and paid off the charge of 2,000*l.* created for the two daughters of Vandeleur. He died in February, 1837, leaving the respondent his heir, and the first tenant in tail *under the deed of February, 1807. William Scott married in 1815. Bindon Scott was a party to his marriage settlement, in which the lands of Knoppogue were included, and were charged with a jointure for the wife. William Scott died in May, 1843, being then in possession of the lands of Knoppogue under the deed of June, 1807, leaving the appellant, his eldest son, who immediately entered into possession of the said lands.

John Bindon Scott (the present respondent) claimed these lands of Knoppogue under the deed of the 28th February, 1807, and in Hilary Term, 1844, brought ejectment against John Scott (the appellant), who had succeeded his father William Scott in the possession of them, and who rested his title on the deed of the 13th June, 1807. At the trial of the cause at the Clare Summer Assizes, in 1844, the defendant contended that the legal estate having become vested in Bindon Scott by the reconveyance of September, 1811, the claim ought to have been before enforced, and was now barred by the Statute of Limitations. The learned Judge adopted that argument, and directed a verdict for the defendant. A motion for a new trial was refused by the Court of Queen's Bench.

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On the 27th May, 1845, J. Bindon Scott filed his bill in this cause against John Scott, in which he set forth the deed of 28th February, 1807, and the proceedings in ejectment, and prayed that the trusts of the said deed, so far as related to the lands of Knoppogue, might be carried into specific execution; that the plaintiff might be declared entitled to the possession of them; that the reconveyance of September, 1811, might be decreed to have been obtained by Bindon Scott in the character of trustee for any persons having any estate therein by virtue of the deed of February, 1807, or that the defendant might be compelled to admit on the trial of any ejectment that John Scott the elder was seised in fee of the said lands at the time of the execution *of the said deed, and that the plaintiff might be declared entitled to an account from May, 1838, and to an admission of assets, and an account, and further relief.

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In October, 1845, John Scott put in his answer, by which he admitted that John Scott the elder had been seised in fee of the said lands, and he set forth the deeds of 11th August, 1806, and 12th and 13th June, 1807, and alleged that the deed of February, 1807, was a voluntary conveyance to Bindon Scott, and was not executed on considerations for value as alleged in the bill, and that it ought not to be treated as a *bonâ fide* conveyance, so as to defeat the conveyance of the lands of Knoppogue to William Scott; and that the said lands must have been introduced into the deed of February, 1807, through ignorance or collusion; and that the registration of the said deed was fraudulently made pending negotiations for the new settlement of the property in June, 1807, and ought not to be allowed to prejudice the deeds then made, which he suggested were prepared, on the recommendation of Mr. Burton, as a substitute for the deed of the preceding February. The answer submitted that the indenture of 13th June was a conveyance for a valuable consideration, and alleged a legacy to William by his father of 2,000*l.*; but that William had, in virtue of the deed of 13th June, 1807, never claimed either that legacy or any portion of the 5,000*l.* under the settlement of 1763. It then alleged that William, with the knowledge of Bindon Scott, had expended large sums in improving the Knoppogue estate, and that William had charged a jointure on said lands to the amount of 200*l.* a year.

The cause was heard before the Right Hon. MAZIERE BRADY, the Lord Chancellor of Ireland, who, by a decretal order of 28th June, 1848,

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directed it to stand over till there *had been another proceeding by ejectment, at the trial of which all temporary bars were to be waived: and further directions were reserved. Another action was accordingly brought, and on the trial, at the Spring Assizes of 1849 for the county of Clare, the appellant obtained a verdict, the jury finding, on the two issues then raised, that the deed of February, 1807, was not, but that the deed of June, 1807, was, executed for a valuable consideration. That verdict was set aside on grounds entirely relating to evidence, and the cause was again taken down for trial at the Spring Assizes in 1850; but the appellant did not appear, and the respondent, in Easter Term, entered up judgment by default. The cause in equity came on in December, 1850, for further directions, when the LORD CHANCELLOR made a decree, directing that possession of the lands of Knoppogue should be delivered to the respondent, and that an account should be taken from the 27th May, 1839, of the rents received by William Scott up to the time of his death, in May, 1843, and by the appellant since the death: and the costs were apportioned. This appeal was brought against this decree, and the previous decretal order on which it was founded.

Mr. Isaac Butt (of the Irish Bar) and *Mr. Rolt* (*Mr. Selwyn* was with them), for the appellant:

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The deed of February, 1807, was a voluntary deed. The pretended consideration on the part of Bindon Scott, of paying the debts of his father, was merely nominal, for he received at the same time an assignment of the personal property, which shows that the payment really came from the father's estate. * * The fact that the deed of February gave an interest to the children which Bindon Scott might possibly have by any future marriage cannot prevent the new settlement of June from taking effect, for the deed of February was a voluntary deed, and these children were, as against the joint act of all the parties, mere volunteers. Bindon Scott had not married in June, 1807, nor was his marriage then contemplated, and therefore no bill could have been filed on behalf of children to compel the registration of this voluntary deed. The Courts will not treat such a provision for future possible children as meritorious, otherwise a settlement by a bachelor on a possible child might be good.

(LORD ST. LEONARDS: In the case you put, if that was followed

by a marriage, *Brown v. Carter* (1) shows that it would be very difficult to upset such a settlement.)

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* * Whatever rights Bindon Scott had previously possessed, he gave up on becoming a party to the deed of June, 1807. On the other hand, the deed of June being executed for valuable consideration, and William Scott having married while he was in possession of the lands of Knoppogue conveyed by it, his children must be regarded as purchasers under that deed. [On this point they cited *Davenport v. Bishopp* (2), *Colyear v. Mulgrave* (3), *Heap v. Tonge* (4).]

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Mr. Fitzgerald (of the Irish Bar) and Mr. Fleming, for the respondent, [with reference to the deed of February, 1807, said] :

* * Here is a valuable consideration, and the contract founded on it expressly applies to the life estate of the father and to the children. It therefore enures for their benefit. *Pulvertoft v. Pulvertoft* (5) shows that the consideration of marriage extends to persons not directly within it. The consideration here was good : *Persse v. Persse* (6), which carried the case further than any other ; and there and in *Doe d. Baverstock v. Rolfe* (7), it was declared that the inclination of the Courts always appears to have been to support a fair settlement in favour of the persons intended to be benefited by that settlement. The cases of *Davenport v. Bishopp* (2) and *Colyear v. Mulgrave* (3) are not in point, for they were mere executory *contracts. * * The settlement was made on a good consideration, and even if voluntary, being for the benefit of the children of a marriage, it might be enforced as against the parties to it : *Brown v. Carter* (1), *Kekewich v. Manning* (8). * * *

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Mr. Butt, in reply. * * *

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THE LORD CHANCELLOR :

March 13.

After stating the circumstances of the case, .

It appears that in the year 1811 Bindon Scott paid off the mortgage conformably to the covenant he had entered into to pay

(1) 5 R. R. 191 (5 Ves. 862).

(5) 11 R. R. 151 (18 Ves. 84, 92).

(2) 60 R. R. 234 (2 Y. & C. C. C. 451).

(6) 51 R. R. 22 (7 Cl. & Fin. 279).

(7) 47 R. R. 687 (8 Ad. & El. 650).

(3) 44 R. R. 191 (2 Keen, 81).

(8) 91 R. R. 53 (1 D. M. & G. 176).

(4) 89 R. R. 339 (9 Hare, 90).

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his father's debts, upon which occasion the legal fee was conveyed to him; and there can be no doubt that when he took that conveyance he took subject to the equitable rights of all the parties under those deeds, whatever was the fair construction of them. Under the first deed he became the trustee of Knoppogue for himself for life, afterwards to his first and other sons; but he then conveyed *away his own life interest, by deed, to William Scott, concurring therein with his father in making the conveyance to his brother.

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In 1844 John Bindon Scott brought an ejectment, claiming that under the deed of February, 1807, he, upon the death of his father, became entitled to this property; he had, in fact, become entitled seven years before he brought the ejectment. He brought the ejectment, but he failed; and he failed for a reason, the force of which I own I do not altogether feel. It would seem that he failed because he had too much estate, not because he had too little; because Bindon Scott, being the person to whom this legal fee was conveyed, and therefore from whom it would have descended upon his son, it is said that during all the life of William Scott, Bindon Scott was the owner of the legal fee, but that, possession never having accompanied it, William Scott must be considered to have obtained by the Statute of Limitations a good title to the fee against him. That decision has not been quarrelled with, and it is, therefore, proper to assume it, for the purpose of the present argument, to be correct. The result is, therefore, that Bindon Scott was deprived of his estate, by virtue of the Statute of Limitations, by the possession of his brother William, and consequently John Bindon Scott, his son and heir, could not recover in that ejectment. Failing in the ejectment, John Bindon Scott was driven to seek relief in equity. His equity was this: under the deed of February, 1807, he was the equitable owner of the estate tail, but only equitable owner because the legal fee was outstanding, first in the mortgagee, and afterwards in those who claimed under the mortgagee; therefore he came to a court of equity desiring to have relief given in equity, asking that any persons who had the legal fee, whoever they *might be, might be ordered to convey to him, and that he might be put into possession.

In answer to that claim, the appellant, as William Scott's son, set up this defence: He said that the deed of February, 1807, was a voluntary deed, and that after that deed was executed the parties to it, for a valuable consideration, made, in June, 1807, a settlement of Knoppogue upon William Scott for his life, with remainder to his

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first and other sons ; that that deed of June was a deed for valuable consideration, which, therefore, put an end to the original deed of February, and displaced the interest of all those who were entitled under it. That defence being set up, the question came to be argued before the Court of Chancery in Ireland in the year 1848. The Court reasoned thus : whether this is a valid defence or not is purely a legal question, except so far as relates to the bar created by the outstanding legal fee ; therefore let the matter be put in a proper train of inquiry, and let the plaintiff (the present respondent), who is seeking relief in equity, viz., John Bindon Scott, bring his ejectment, and let the temporary bar, as it is called, be put out of the way ; let it be treated just upon the same footing as if John Scott, the original settlor, had been seised of the legal fee at the time he made the settlement instead of the equitable fee.

It is said that upon several grounds no relief whatever ought to have been given to this respondent ; in the first place, because the plaintiff in the equity suit (who was the plaintiff also in the ejectment) had no right to ask relief against the children of William Scott, because they were purchasers for a valuable consideration, and without notice. How were they purchasers for a valuable consideration ? They were purchasers originally under that deed of the 19th of June, 1807 ; but on the face of that *deed, it is a voluntary deed, and that being so, it could only be determined in a trial properly directed by the Court whether that was or was not a valid instrument. So again with reference to the original deed of February, 1807 ; on the face of that deed, it was a deed for valuable consideration, because there was a covenant on the part of Bindon Scott to pay and discharge his father's debts, which is, to all intents and purposes, a valuable consideration. It may be that that was a fraud, and that it was merely colourable ; the evidence would seem to show the contrary ; but whether that was good or not was exactly the question to be tried at law, and upon which a trial did, in truth, proceed. The jury determined that the February deed was voluntary, and that the June deed was not voluntary. That verdict, upon the motion for a new trial in the Court of Queen's Bench, was set aside. The Court of Queen's Bench was of opinion that the first deed was a deed for valuable consideration, and that the second was a deed without valuable consideration. The Court consequently directed a new trial. The parties have not chosen to avail themselves of a new trial, and the result is, that we must consider that judgment to be binding and conclusive.

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What is now insisted upon is, that no relief ought to have been given in equity, even supposing the second deed to have been in its inception a voluntary deed, for that William Scott's children were purchasers for value. William Scott married in 1815; and on the occasion of the marriage a settlement was made, in which that deed was recited, and Bindon Scott was a party to that settlement. It has, therefore, been contended that although the deed was voluntary in its inception, yet as the parties acted upon it, and treated it as being the deed which gave the estate to William's issue, and as William's wife *married upon the faith of that being the deed for her and her issue, therefore the voluntary character of the deed is displaced. But that argument cannot prevail if the first deed was a good deed. The case, therefore, stands thus: there are two deeds, a deed for value in February, and another deed in June, which, though not then for value, was, according to the arguments, made a deed for value in 1815. But *prior tempore potior jure*; the first deed in February must prevail, as having been a deed for value, and of course it would take precedence over that which was subsequently executed.

The whole case depends upon this fact, and that being so, it follows of course that the plaintiff who seeks relief upon the footing of the valid deed of February, which relief would have been purely legal but for the outstanding term, must properly have such relief given to him in equity as to put him in such a situation as if the relief he sought, founded upon a valid deed at law, had been legal, and not equitable.

With regard to the suggestion that this outstanding legal fee acquired by disseisin is to defeat the rights of the parties, I do not concur in the observations which have been made. It is admitted, that if the party who by virtue of the Statute of Limitations claimed to have got the legal fee, had so got it by conveyance, with notice that the party from whom the conveyance proceeded was a trustee, he could not have taken it except upon the trusts upon which the party from whom he took it held.

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In these circumstances, it was perfectly right to direct a trial, and the result of the trial must be taken to be that which was the result of the motion for the new trial in the Court of Queen's Bench in Ireland. That being so, the only remaining questions are as to the propriety of the second decree, which appears to me to *admit of no sort of doubt. It was perfectly right that the party should have a decree putting him in possession of that which was outstanding in

trustees, and should obtain such an account as the Court is in the habit of giving, viz., an account of the mesne profits for six years, from the person who holds the party entitled, as if it had been a legal instead of an equitable estate. I shall therefore move your Lordships that this decree should be affirmed.

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LORD BROUGHAM :

I only think it necessary to say that I entirely concur.

LORD ST. LEONARDS :

I also think that this case must be decided against the appellant. As the questions are of some importance, I shall trespass upon your Lordships for a very short time. As I understand the argument of the appellant, he puts the case simply upon his legal title ; he says, " I have a legal title by adverse possession, and I am in a situation in which, in a court of equity, you are not entitled to claim relief against me." Now, as regards his legal title, that came before a court of law in Ireland, which decided that the legal title, under the Statute of Limitations, did prevail independently of any equity. That depended upon a very nice point. If there had been originally a conveyance in this case of the legal estate instead of there being a conveyance of the equitable estate, it is perfectly clear that the Statute of Limitations would have been no bar, because then William, taking by a conveyance (which is what distinguishes this case from the cases where there is an adverse possession without a conveyance) from a man who under a settlement was tenant for life, never could have set up his possession during that tenancy for life, against the tenant for life ; and although it might *have been conveyed to him in words for his own life, he could not have set up that estate, so acquired by actual conveyance, as a bar to the remainder-man under the settlement under which the person who conveyed to him claimed. This singular state of circumstances therefore happened, and the consequence is what I will state. The legal fee was outstanding ; the conveyance, therefore, was only of the equitable estate ; but the person who had the equitable tenancy for life conveyed to William, what must be held to pass (with the view I am now regarding it) only his life estate, and the remainder-man was not affected. If the person who had thus conveyed the equitable estate ultimately obtained a conveyance of the legal fee, that was, as regarded him, an admission that the legal fee at that moment was an operative estate. What was the consequence ? It was this : that the

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legal estate being afterwards got in, his previous conveyance would not, as in many cases of life interest, operate by way of estoppel against the legal fee thus subsequently obtained; but the moment he obtained that legal fee he became the trustee for the persons who claimed under that settlement. Now, who were the persons who claimed under that settlement? The first was William Scott, for he had by conveyance obtained the right to the equitable estate of Bindon Scott, and when Bindon Scott therefore obtained the legal fee, William Scott became entitled to the equitable life interest of Bindon Scott to be carved out of the legal fee. Then at law it would have been open to contend (I mean to give no opinion binding myself at all upon that point, but I confess I should be strongly disposed to think so) that under the Statute of Limitations this view might have been taken of it: This estate which you (William Scott) claim, you claim by conveyance from Bindon; the legal estate was at the time of that conveyance outstanding; Bindon *got in that legal fee; Bindon never could have proceeded against you upon that legal estate, because if he had been so foolish as to bring an ejectment, equity would instantly have stopped that ejectment; for by the operation of the conveyance in fee he would have been estopped from asserting any right to that legal estate during the whole of his own life. Should not there be a corresponding right? If the one party is to be bound, ought not the other party to be bound? Where was the difficulty for a court of law to say that William Scott held under Bindon Scott, and that Bindon Scott having obtained the legal estate, the possession of William Scott was the possession of Bindon Scott, and that William Scott claiming under Bindon Scott, never could be heard to say that he held adversely to Bindon by the settlement under which William had obtained nothing more than a life estate. However, it was decided otherwise, and this House is not now called on to reverse that decision.

Then as regards the equity. I can have no doubt in recommending your Lordships to hold, as a point of law not to be disputed, that that legal estate became a trust for all these persons, and that consequently, although, at law, William Scott might himself, as against the children of Bindon Scott, set up his possession, it was, in reality, no adverse possession. Although that phrase may perhaps be used in a different sense to that in which it was used before the 3 & 4 Will. IV. c. 27, yet I see no difficulty in advising your Lordships to come to the conclusion that that legal estate

never could be set up as against those parties who had, after the conveyance of the equitable estate, entitled themselves to the legal estate. The question at last resolves itself into the right as between these parties under the different settlements. Who is entitled to the estate? Take the first settlement under which Bindon *Scott claims; it is perfectly clear, in point of law, that upon the face of that settlement, it is a settlement for valuable consideration, which never can be impeached. No settlement was ever more so. Like any other deed, it may be impeached by showing that the consideration is not truly stated; that that which appears to be the real consideration was not the true consideration; that it was a sham and a pretence; that there was collusion, and that there was fraud. That is a question for a jury. The parties here went to a jury upon that very question, and a wrong verdict was given; but the Court reversed that finding, and properly stated that there was not a *scintilla* of evidence to show that the first consideration was a fraudulent one. Then what is the consequence? The first deed stands, and the second deed cannot interfere with it as far as regards the consideration. The parties had a right to re-try that question; but when the moment came for that purpose, they entirely withdrew from the opportunity which had been offered them. They deserted the case. The decree therefore necessarily went against them in the court of equity, and this House is bound to consider that, in withdrawing from the trial of that question, the appellant admitted that the consideration in the first deed was a valid and real consideration, and that there was no pretence for denying it. This House must consider that as a settled point.

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When we look at the deeds with the eye of a real property lawyer, all difficulty vanishes; I never, indeed, could understand where the difficulty was. The first deed was a perfectly binding deed, and there was an attempt to concoct and set up a title as against that deed. I cannot mention Mr. Burton's name without stating the high respect and regard which I have for the memory of that learned person, who became so illustrious a Judge in *Ireland; but he was pressed with business, and was not able to do more than chalk out the draft of the intended deed, and consequently he did not give the advice which I should have expected from his practical knowledge; he advised the parties, if the first deed was not upon the register, to do something, which no counsel ever should advise parties to do, namely, to put aside and cancel a deed, and endeavour to make a title in lieu of it. In my experience, I never knew any

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attempt of the sort which did not end in failure, and in involving the parties in litigation probably as expensive and as long as this has been.

The attempt was to get rid of the deed of February, and form a new title. These two subsequent deeds were meant for that purpose; but the first deed, that of February, now stands as the deed for valuable consideration; it was prior in point of date, and was upon the register before the second deed was executed, so that the second deed, whether for valuable consideration or not, never could come into competition with the first.

It was the absolute duty of the solicitor to register the deed of February, which included other lands besides those mentioned in the deed of June, in order to give effect to those titles which were not intended to be affected by the new arrangement. The new arrangement was a contrivance (I regret it ever was resorted to) to defeat the actual title, and it has failed in its object. I am clearly of opinion that there is not the least pretence for affecting the respondent's title in this case; and I therefore submit to your Lordships that this appeal should be dismissed, with costs.

Appeal dismissed: Decretal order of 28 June, 1848, and decree of 11 December, 1850, affirmed, with costs.

1854.
Feb. 21, 23,
24.

MARQUIS OF BRISTOL v. ROBINSON.

(4 H. L. C. 1088.)

On the hearing of a cause, in which the question intended to be brought up for decision depended on the form of the pleadings, and the House, after argument, was of opinion that the pleadings would not allow that question to be properly decided, time was given to allow an arrangement between the parties, by which the pleadings might be altered for that purpose.

1854.
March 13, 14.

LONDON (CORPORATION OF) v. COMBE.

(4 H. L. C. 1089—1090.)

The House will refuse to allow a cause to stand over indefinitely, though upon an understanding that the appeal is to be compromised, but will require it to be proceeded with in its regular turn, or to be withdrawn.

TERRELL *v.* HUTTON (1).

(4 H. L. C. 1091—1104; S. C. 23 L. J. Ch. 345; 18 Jur. 707.)

Certain persons proposed to form a Company; they employed A. as their solicitor; he was so named, on provisional registration, under the Joint Stock Company's Act; the directors were not to be personally liable to the officers of the Company; the solicitor was continuously employed, until after the Company had been completely formed and registered, and until it was wound up. The 44th article of the deed of settlement declared, that "a sufficient part of the funds of the Company should, upon complete registration, be appropriated in payment of the expenses of and incidental to the formation of the Company, including those of or having reference to the preparation and execution of that deed." When the Company was before the Master on the Winding-up Act, the solicitor presented a demand for services from the earliest period up to that time. The Master allowed the demand as a claim only, and not as a debt, leaving the solicitor to proceed at law:

Held, reversing an order of Vice-Chancellor KINDERSLEY which had permitted the order of the Master to stand, that the Master ought to have allowed this demand as a debt, but subject to proof that the items came under the description contained in the 44th article, and subject also to taxation.

As the solicitor had omitted to bring the 44th article to the notice of the Vice-Chancellor, his order, though reversed, was reversed without costs.

In 1846 two gentlemen named Holt and Swift proposed to establish, in London, an Insurance Company, under the name of "The Independent Life Assurance Company." The appellant was employed as attorney and solicitor in the formation thereof. The proposed Company was provisionally registered on the 13th February, 1847, and on the same *day the appellant was formally appointed by the promoters to be the attorney of the proposed Company, and his name was so registered. On the 15th May, 1847, at a meeting of the directors, several resolutions were passed, one of which confirmed the appointment of the officers of the Company, subject to the provisions of other resolutions then agreed to. Of these, the 12th declared, "That no director shall be personally responsible for the salaries of any of the officers of the Company, and that no officer shall obtain payment for his services until a sufficient sum shall be obtained by the funds of the Company for that purpose. Nevertheless, the first fund that shall be formed by the payment of the deposits on the shares to be taken by the directors and others, shall be appropriated to the payment of the expenses of the formation of the Company." At a meeting held on the 22nd May, it was resolved to raise a subscription to enable the appellant to advertise; the sums subscribed were to be allowed

1854.
March 16.Lord
CRANWORTH,
L.C.Lord ST.
LEONARDS.Lord
BROUGHAM.

[1091]

[*1092]

(1) *In re Skegness and St. Leonards Tramways Co.* (1888) 41 Ch. D. 215, 58 L. J. Ch. 737, 60 L. T. 406.

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in part payment of shares. On the 8rd of August a resolution was passed authorising the appellant "to take the necessary steps for preparing the deeds of the Company;" and on the 9th of August another, instructing him to make inquiries respecting offices, and to issue prospectuses, &c. On the 12th August the statutory return of the names of the provisional directors, &c., was made, and this return included the name of the appellant as solicitor to the Company. On the 8th February, 1848, he was instructed as "the solicitor" provisionally to re-register the Company. On the 4th March, 1848, a resolution was passed calling for a statement of the liabilities of the Company, one of the items mentioned being "the solicitor's bill, including counsel's fees, to be laid before the directors." The bill was sent in on the 9th March; and on the 27th May, in a resolution of the directors, that item was recognised as one of the liabilities *of the Company. On the 28th August, 1848, the deed of settlement was executed, the 44th article of which was in the following terms:

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"That a sufficient part of the funds of the Company should, upon the complete registration thereof, under the provisions of the said Act of Parliament, be appropriated in payment of the expenses of and incidental to the formation of the Company, including those of or having reference to the preparation and execution of that deed, and such complete registration as aforesaid, and every deed of supplement for that purpose."

In January, 1850, the VICE-CHANCELLOR OF ENGLAND made an order on petition directing that the Company should be wound up, and under this order the respondent was appointed official manager. In April the appellant sent in his bill consisting of an account delivered in December, 1848, to the secretary, with the addition of fees, charges, and disbursements, amounting together to 645*l.* 7*s.* The Master to whom the matter of winding up was referred refused to allow this bill as a debt, but by an order of the 12th July, 1850, declared that it should be allowed as a claim only, with liberty for the appellant to proceed at law. The appellant, on the 13th November, 1851, brought this order before Vice-Chancellor KINDERSLEY, who declined to make any order thereon, and directed the costs of the official manager to be paid out of the estate, but refused to allow any other costs (1). The present appeal was then brought.

(1) 2 Sim. N. S. 127. No notice was taken of the 44th article of the deed of settlement when the case was heard before Vice-Chancellor Kindersley.

Mr. Willcock and Mr. H. Terrell for the appellant :

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The Master was wrong in not admitting this demand as a debt. It was a matter of account between the parties *under the Winding-up Act, 11 & 12 Vict. c. 45, and ought to have been adjudicated upon by him, without driving the appellant to an action at law.

[They cited several cases under the old Winding-up Acts, but as the question here turned eventually upon the special clauses in the deed of settlement it is unnecessary to refer to the cases cited.]

The *Solicitor-General* (Sir R. Bethell) and *Mr. Roxburgh* for the respondent, [contended that the Winding up Act of 1848 related exclusively to the settlement of questions among the members of the Company. This appellant claimed to be a creditor of the Company; he was not, therefore, within the operation of the Act, nor was his bill confined to expenses covered by the 44th article of the deed of settlement].

[1095]

(LORD ST. LEONARDS: It does not appear that section 44 of the deed of settlement was brought to the Vice-Chancellor's notice. There is nothing in that section relating to preliminary expenses.)

[1096]

What they were, was the subject of dispute before the Master, and he therefore properly referred the parties to law. Antecedently to the formation of the Company, the only persons liable to the appellant were those who actually employed him. Those persons alone could afterwards *come on the Company for repayment of the expenses thus incurred, but the Company was not liable to him in respect of such charges.

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Mr. Willcock, when about to reply, was asked whether the appellant was ready to submit the bill to examination, to determine whether the expenses he claimed came within the words of the 44th article of the deed, "Expenses of and incidental to the formation of the Company?" He answered in the affirmative.

THE LORD CHANCELLOR :

Then, my Lords, I have no difficulty as to the advice I shall give to your Lordships in this case. His Lordship having stated the facts, said :

The House goes along with the respondent to this extent, that the Company ought not to be bound by the items in detail which are included in the bill; but provided it is established that this bill

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was made up either of items in respect of business properly done by Mr. Terrell after the formation of the Company, or of items properly coming within the description of the "expenses of and incidental to the formation of the Company, including those of or having reference to the preparation and execution" of the deed, I think it was wrong not to allow this bill as a debt.

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I do not at all recede from any words attributed to me in former cases. I think the view which I then took of these Winding-up Acts was correct. The Winding-up Act of 1848 was made for the purpose of enabling such of these Companies as, from altered circumstances, or from miscalculated probability of profit, should turn out to be incapable of being prosecuted with advantage, to be wound up. In order to do so the Legislature meant to put them in a situation very nearly the same as if some one partner of any ordinary partnership had filed a bill or got a decree *for winding up the partnership, which would render it necessary to take the partnership accounts and settle the liabilities amongst the partners, as well as the nature of the case would permit. Provision was, therefore, made for giving a summary proceeding of that sort by going to the Master's office. In order to enable the Court to proceed to wind up a Company, it is material to ascertain what are the debts due by the Company. Until that is ascertained, it is impossible to find what sum of money the parties must respectively contribute in order to make up the proper and necessary fund. With that view the 73rd and other sections were enacted. To prevent delay and needless expense, any person commencing, or who has commenced, proceedings at law, is prohibited from recovering payment of any debt or demand he may have, without first coming and proving it before the Master, so that the Master may know what is the amount of the debts. What is the course which is then taken? The Master is, by the subsequent sections, directed to raise a sufficient fund for winding up the Company's affairs, having regard *inter alia* to the amount of debts proved.

There is no doubt that there was no intention on the part of the Legislature to give to creditors any larger right, or to take from them any portion of an existing right, in respect of the enforcement of their debts. The question here is, whether, under these circumstances, this demand is something which ought to have been admitted as a debt.

I cannot say that I have no doubt on this subject, but I think I see my way clearly to a conclusion, subject to what I have stated

as to ascertaining the amount, which must be done by subsequent inquiry, and which the parties at your Lordships' Bar are willing to agree to. Subject to that, I think this is admissible, upon the strictest principle, *as a debt under the Winding-up Act, and I come to that conclusion for this reason : Quite independently of the Winding-up Acts, it has been long ago established (Lord COTTENHAM enunciated the proposition many times) that these Companies cannot take the benefit of what has been done by those who have formed them, without thereby incurring responsibilities to those persons. Now, that observation, which has been extended to a very great class of cases under the Winding-up Acts, applies, in my mind, pre-eminently to a solicitor, who is doing that without which the Company never could have existed. It is an old and well-known principle in the law, that when one person does an act as an agent for some other person, though then quite unknown to that other, if afterwards the latter adopts the act, it is just the same as if he had authorised it from the beginning. I think that principle will, with the aid of the 44th article, enable your Lordships safely and distinctly to come to a conclusion here. I am not certain that it would not have been sufficient without that article. That which was done for the necessary purpose of forming the Company, or in the prosecution of the necessary business of the Company after it was formed, is to be treated as a debt of the Company, *ab initio*. If that is so, then the only question is a question as to the amount which is due, because that the appellant did purport to act (whether with or without authority) as the solicitor of some embryo Company, cannot be disputed. What I should recommend your Lordships to do is, to allow this appeal so far as to discharge this order, and return it back to the Court of Chancery with the declaration that Mr. Terrell ought to be admitted as a creditor of this Company for the amount of all work and business properly done by him since the formation of the Company, and for the amount of so much of his bill of costs, of all expenses of and incidental to the *formation of the Company, including those of or having reference to the preparation and execution of the deed, and such complete registration as aforesaid; and also with power to direct the said bill to be subject to taxation. The suggestion must go beyond mere taxation, because the appellant must establish *ultra* taxation, that these items are items properly coming within the description of the 44th article.

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Lord BROUGHAM intimated his concurrence.

LORD ST. LEONARDS :

My Lords, I also entirely agree with the noble and learned Lord on the woolsack. The matter is not open to any doubt. Under the Joint Stock Companies' Act (7 & 8 Vict. c. 110), it is quite clear that a solicitor might be employed before the Company was formed, and it is of necessity that a solicitor should be employed, for there must be a great deal of business preliminary to the formation of any considerable Company which a solicitor alone can transact. The Joint Stock Companies' Act does itself expressly provide for the appointment of a solicitor, and attributes to that solicitor the performance of certain duties, which, without that power in the Act, would be a breach of its other provisions. The 25th section takes it for granted that to a certain extent a Company, when formed, will be bound by antecedent contracts, but to what extent that may be is another question.

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Then we come to the Winding-up Act. I cannot feel that there is the slightest doubt in the description of a creditor there. "The word 'creditor' shall include every person having any debt or demand enforceable against any Company in any court of law or equity, or for non-payment, or non-satisfaction of which damages could be *recovered." So that the Winding-up Act does most expressly provide for what may be called equitable debts as well as for legal debts. Any argument, therefore, to show that there would be a difficulty, if not an obstacle, in the way of recovering at law this particular demand, is of itself a sufficient reason for giving to the party relief in equity if the demand constitutes an equitable debt. The moment you say you cannot recover a debt at law, assuming it to be a just debt which ought to be paid out of the assets of the Company, it must properly be recoverable in equity. The intention was to provide for debts recoverable only in equity, as well as for debts recoverable at law.

The 58th section of the Winding-up Act, which has been much relied upon at the Bar, does of itself reserve the rights of the parties in those cases in which they are not otherwise expressly provided for by the Act. Supposing that there was no legal right in this appellant to recover, then it falls expressly within the Winding-up Act as an equitable right. In this case it is not the creditor who insists upon bringing the action, but it is the Company which insists that the creditor shall bring it.

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Passing on to sections 72, 73 and 74, they put the matter beyond all doubt, for they tell you what shall be done before an action is brought by the creditor. They put a restraint upon him, and prohibit him from bringing an action till he has come in to prove his debt before the Master.

The 75th section, to which I find no answer, gives the Master power, according to the proofs exhibited before him, either to allow or disallow, or allow as claims only, such debts and demands. There is nothing to control him in the exercise of this power. But then there is an appeal against his decision. When the case came on in the *Court below, by some accident the section 44 in the deed was not brought to the Vice-Chancellor's attention. That section puts the Company out of Court. The promoters appointed the appellant their solicitor. They have had the benefit of his knowledge and diligence, and made use of him as their solicitor. They have from time to time re-appointed him their solicitor. They received his bill, and when they became a Company, then he was properly constituted as the continuing solicitor; there was never any break in his employment; he continued throughout, and the effect of not providing for his previous charges would have been this, that the promoters individually would have been liable to the Company's debts, and the debt to him among the rest, as far at all events as funds had come to their hands. What would be the result of that? That then they would have had their relief, under the clause of the deed to which I am about to refer, as against the general body. Could anything be more absurd and improper than that there should be this circuitry of action, first by this solicitor against the individual promoters, and then by those promoters against the Company of which they form a part? It is quite impossible that anything of the sort could have been intended.

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The contract of all the parties forming the Company was this, that they would pay out of the funds of the Company all the proper expenses of forming the Company, up to and including the cost of the preparation and execution of the deed of settlement. There is no individual responsibility, but the funds are liable; and what constitutes those funds? all the capital whether called up or not. If it has not been called up, it must be called up in order to constitute those funds, the liability of which is rendered clear beyond all doubt by the 44th article.

Here is a clear equitable debt which is provided for by the deed of settlement, and the funds are brought into the *Court of

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Chancery. Under the Winding-up Act the question the Master has to ascertain is not simply what debts are due by the Company which are recoverable at law, but what debts, *quà* debts, are recoverable as debts against the Company, either in a court of law or in a court of equity. This debt clearly fell under the latter denomination. It admits of no doubt whatever, that the order of the VICE-CHANCELLOR was made incautiously, the 44th article not having been brought to his attention; it must, therefore, be reversed, but reversed under the conditions which have been mentioned by my noble and learned friend.

As the cause of the mistake must be considered to rest with the appellant in not having brought the matter properly before the Court, and in insisting also upon the whole of his demand, which demand certainly ought to be subjected to an investigation, he would appear to be justly liable to costs; but it would be going too far to make him pay the costs of the appeal and yet to give him a decree; and therefore what I submit to your Lordships is, that there ought to be no costs given in this case.

CHANCERY.

STANDISH *v.* MAYOR, &c. OF LIVERPOOL.

(1 Drewry, 1—11.)

1852.
March 11.

The contractors for a Corporation which had served notice to treat on the plaintiff as owner for the purchase of land under the Lands Clauses Consolidation Act, 1845, deposited plant and materials on the land by permission of the tenant: Held that this did not amount to an entry on the land within s. 84 of the Act.

[It is thought sufficient to note here that the plaintiff filed this bill for an injunction in ignorance of the fact that the tenant's permission had been obtained by the contractors, and under the mistaken belief that the Corporation had thus taken possession of the land without complying with the provisions of the Act.—O. A. S.]

HAWKINS *v.* GATHERCOLE (1).HAWKINS *v.* CARRACK.

(1 Drewry, 12—20; S. C. 21 L. J. Ch. 617; 16 Jur. 650.)

1852.
May 27.
July 2.KINDERSLEY,
V.-C.
[12]

Where a receiver of tithes had been appointed on behalf of an incumbent upon a vicarage, a subsequent mortgagee of the advowson, with notice of the appointment of the receiver, issued a sequestration, and proceeded up to publication, but did not take or receive any funds of the living: Held, that this ought not to have been done, without the leave of the Court; that it was an interference with the possession of the receiver, and was a contempt.

In these suits a motion was made to commit Carrack, the defendant in the supplemental suit, for contempt in issuing and prosecuting up to publication, a writ of sequestration against the tithes and of the vicarage of Chatteris Nuns, of which Gathercole was incumbent, while a receiver, appointed by the Court in the original cause, was in possession, and with notice of that fact. The order for a receiver to take possession of the tithes of the living of Chatteris Nuns, was made on the 21st of November, 1850. The receiver was a Mr. Burder. An incumbrance on the same tithes was afterwards created in favour of Carrack. The plaintiff's original sequestration had been long since satisfied and discharged. On the 17th of December, 1851, Carrack's solicitor served a notice on the plaintiff's solicitor, of the mortgage by Gathercole and others, of the advowson to Carrack, subsequent to Hawkins' incumbrance. On the 25th of February, 1852, the plaintiff filed his supplemental bill against Carrack. On the 30th of April, Carrack issued a sequestration out of the Court of Queen's Bench;

(1) Reported, on the question of the charge upon the benefice, in 6 D. M. & validity of the judgment debt, as a G. 1.

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it was lodged on the 4th of May, and published on the 9th of May. The question to be decided *was, whether the publication of the sequestration was a contempt, and whether Carrack could be allowed, by a contempt, to gain a legal priority in virtue of his sequestration, so as to defeat the prior equitable right of Hawkins.

Mr. Stuart and Mr. Sidney Smith for the plaintiff:

* * If it is said that issuing the sequestration is not a contempt, at any rate the publication is; for by that, every party liable to pay in respect of the profits of the living, has notice not to pay except to the sequestrator. That is an interference with the receiver, and a contempt: *Russell v. East Anglian Railway Company* (1).

Mr. Malins and Mr. Shebbeare for the defendant, Carrack:

[*14] The mortgage to Hawkins of the 3rd of August, 1845, *for 24,000*l.* was not of the tithes, but of the advowson; and the principal sum is not due till the 8th of August, 1852. * * What we have done is no more than putting the writ into the hands of the Bishop that he may use it when the goods are clear, and not till then: in *Russell v. East Anglian Railway Company*, the creditor was not held guilty of any contempt; nor can he be here. If [*15] *anything had been done, it must have been by the Bishop, and he would be the person guilty of contempt.

Mr. Sidney Smith, in reply:

The defendant should have applied to the Court for leave; he has mistaken his course; he went beyond what was necessary: the publication of the sequestration gives notice to the tithe-payers not to pay to any but the sequestrator; that is an interference with the receiver's possession, and the party guilty is the party putting the officer in motion. The publication gives priority; if the Bishop did not publish, he would be responsible; it is therefore the act not of the Bishop, but of the party obtaining the writ.

July 2.

THE VICE-CHANCELLOR:

In this case of *Hawkins v. Gathercole*, the motion was made by the plaintiff, Mr. Hawkins, to commit the defendant, Mr. Carrack, for a contempt of Court, in having interfered with the possession of the receiver appointed by this Court. It appears that the plaintiff,

Mr. Hawkins, being a creditor of the defendant, Mr. Gathercole, filed a bill against him, and got a receiver appointed. It is unnecessary to enter into the particulars of the rights of Mr. Hawkins, it is sufficient to say that Lord CRANWORTH determined that Mr. Hawkins was entitled, upon his bill, to have a receiver appointed of the profits of a living of which Mr. Gathercole was the incumbent. Mr. Burder was appointed such receiver, and is still the receiver. Mr. Carrack, another creditor of Mr. Gathercole, having recovered judgment against him for the amount of his debt, issued an execution, and the sheriff having in the ordinary course returned *nulla bona*, and that the defendant, Gathercole, was a clergyman, an ecclesiastic having no lay fee, the usual process *was issued under the writ of sequestration, from the Court of Queen's Bench, which writ, in the ordinary form, is addressed to the Bishop of the diocese as the substitute for the sheriff, sometimes called the ecclesiastical sheriff, directing him to sequester the living of Mr. Gathercole in his diocese. The Bishop of Ely, in the usual course, issued his sequestration, addressed to the sequestrator (in this case, as it happens, the same gentlemen, Mr. Burder, who is also the receiver appointed under the order obtained by Mr. Hawkins, the plaintiff); but the Bishop issued his sequestration in the ordinary form; and in pursuance of the ordinary course in such a case, that sequestration was published by affixing it upon the doors of the church of the parish of the defendant. The effect of that sequestration is that the Bishop, by the terms of it, does so far as by law he may or can, "sequester all and singular the rents, tithes, oblations, obventions, fruits, issues, and profits thereof, and other ecclesiastical goods of the said Michael Augustus Gathercole, belonging to the said vicarage and parish church of Chatteris Nuns aforesaid, within our jurisdiction, and to the aforesaid Michael Augustus Gathercole, the incumbent thereof, belonging or appertaining, and do sequester the same by these presents, and strictly enjoin you (that is, the sequestrator named in the sequestration, Mr. Burder) to publish this our sequestration so by us interposed to all and singular that are interested therein, by affixing the same, or a copy thereof, on the door of the parish church of Chatteris Nuns aforesaid, or as near thereto as may be, and in other public places, as you shall think proper or expedient in this behalf, and also to ask for, demand, and collect, levy, and receive all and singular the said rents, tithes, oblations, obventions, funds, issues, and profits thereof, and other ecclesiastical goods whatsoever

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*belonging to the said vicarage and parish church of Chatteris Nuns, and to the said Michael Augustus Gathercole, as vicar thereof, in whose hands or possession any such are or may be found remaining; and by and out of the same profits and emoluments (if need be) to cause the cure of the said church of Chatteris Nuns to be duly served, and to cause all other duties and charges incumbent on the said church of Chatteris Nuns to be duly performed, borne, and satisfied, and also well and sufficiently to repair," and so forth. It is not necessary to read further. It is sufficient to say that by the effect of that sequestration from the Bishop, the sequestrator named in the document is directed by an authority, which he is bound to obey, to collect, levy, and receive all the profits of this living, and to provide for the service of the church, and then to apply the profits in the ordinary course for the benefit of the creditors. Now the question is, whether the act done by Mr. Carrack in procuring that sequestration amounts to a disturbance of, or interference with the possession of the receiver. Now Mr. Carrack has done nothing more than in the ordinary course of legal process he was entitled to do, by virtue of a judgment which he had recovered against Mr. Gathercole; but it is quite clear that when this Court has appointed a receiver, it will not allow the possession of that receiver to be disturbed by anybody, however good his right may be; but the party thinking he has a right paramount to that of the receiver, or rather to that of the person who has got the appointment of the receiver, must, before he can presume to take any steps of his own motion, apply to this Court for leave to assert his right against the receiver. That is a plain rule, and a very necessary rule: it is not a rule of arbitrary authority, but it is absolutely necessary, because if it were otherwise it would be impossible for this *Court to administer justice between parties; and all inconvenience is entirely prevented, from the circumstance that, upon application made to this Court, this Court will always take care to have justice done, and to give any party who has a right paramount to that of the receiver or the party obtaining the receiver, the means of obtaining justice, and will even assist him in asserting that right, and of having the benefit of it. The question, therefore, that I have to consider is not whether Mr. Carrack in the abstract, as a matter of right and justice, had a right to issue the sequestration; unquestionably he had; but whether he has done anything without the leave of this Court, which has interfered with, or disturbed, or tends to disturb, the possession of the receiver.

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Now it was argued, and very fairly argued, that although all this has been done, no disturbance has yet taken place ; and that the plaintiff should wait and see whether the sequestrator as sequestrator, does collect, levy, and receive any portion of the profits of this living, so as to prevent the receiver from getting them. If that argument could prevail, the same argument would authorize a person to bring an ejectment against the receiver ; because it may be said until he has not only got judgment in the ejectment, but has also issued execution and turned the receiver out, until that final act has been done, there is no disturbance of the receiver. It is clear, however, that the Court will not allow the first step in an action of ejectment against the receiver to be taken by any party, without an application having been first made to this Court for its permission to do it. It appears to me that the act in this case does amount to a disturbance of the possession of the receiver. Any tithe payer, or any person liable to pay any of those dues which belong to the incumbent of the living, would be in this predicament, or might be in this predicament, that there is a demand made upon him, or *there might be a demand made upon him for that payment, by the receiver appointed by this Court, and at the same time a counter demand made upon him by a sequestrator appointed by the authority of the Bishop of the diocese under the Queen's writ of sequestration issuing out of the Queen's Bench ; and it is quite obvious that the moment the sequestrator appointed does anything whatever in performance of the duty imposed on him by the sequestration, that instant he actually disturbs, in point of fact, the possession of the receiver, and taking steps towards that end appears to me to be doing that which the Court would not permit. It appears to me, then, that Mr. Carrack ought before he issued the sequestration (not before he got his judgment against Mr. Gathercole, that he was fully entitled to do, and he was entitled to issue a writ of *feri facias* to the sheriff as he did) ; but before he issued the writ of sequestration to the Bishop, he ought, in my opinion, to have come to this Court stating the facts of the case, and asking leave to do it. What would the Court have done if he had come with that application ? I am satisfied the Court would have allowed him to do exactly what he has done, but upon terms. The Court would have allowed him to do what he has done, for this reason ; it is necessary, in order to give Mr. Carrack a position as between him and his debtor, or between him and other creditors of that debtor, and therefore I am satisfied that if application had been

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made to me in the first instance by Mr. Carrack for leave to issue this writ of sequestration, and stating the fact of the return of the sheriff, that there were *nulla bona*, that there was no lay fee, I am satisfied I should have allowed Mr. Carrack to have issued this writ of sequestration ; but I should have put him upon terms that he should undertake to deal with that writ entirely in submission to the direction of this Court, and should *undertake that his sequestrator should not, without the leave of the Court, receive any portion of the profits of this living. Upon those terms, I have no doubt that I should have allowed Mr. Carrack to do precisely what he has now done without that permission. Now on the part of Mr. Carrack, with reference to what I have been observing as to his position, it was justly represented that to perfect his character as execution creditor, it was necessary to take this step ; and it was justly said that Mr. Carrack, by the very act of appointing as his sequestrator the same individual, Mr. Burder, who is the receiver, has at least indicated that he had no desire practically to interfere with the possession of the receiver ; and it was said that Mr. Carrack has no wish that the sequestrator should take those issues and profits of the living, but only that the receiver who is the same person as the sequestrator should receive them, and the Court will deal with them. Acting upon that suggestion, I have not the smallest doubt that Mr. Carrack will now undertake to do what I think would have been the undertaking he would have given, the undertaking which would in fact have been put upon him if he had applied for leave to take this step ; but inasmuch as Mr. Carrack has taken this step without the leave of the Court, and has, as it appears to me, justified Mr. Hawkins in making this application in order to support the possession of the receiver, I conceive that Mr. Carrack must pay the costs of this application ; and therefore the order that I shall make will be this ; that Mr. Carrack pay the costs of this application, and Mr. Carrack submitting to deal with his sequestration in such a manner as the Court shall, from time to time, direct, and undertaking that the sequestrator, in that character, shall not receive, collect, or levy any portion of the issues or profits of the living without the leave of this Court, let no further order be made on the motion.

THOMPSON v. FALK (1).

(1 Drewry, 21—28.)

1852.

KINDERSLEY,
V.-C.
[21]

Where it is sworn that documents are confidential communications, relating to the particular suit, or to another suit, which though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit.

THIS was a motion for the production of documents admitted by the defendants, the Falks, to be in their possession. The plaintiffs were Thompson and others, proprietors of salt mines. The defendants were R. Falk and H. E. Falk, against whom the motion was made on their joint answer.

This bill was a cross bill. The original bill filed in November, 1850, by the Falks against Thompson & Co. was for the specific performance of a contract dated 16th May, 1850, for the purchase of some salt mines which were in lease to the Falks by Thompson & Co. The consideration of the purchase being, in addition to the reservation of royalties, a contract by Thompson & Co. to deliver to the Falks, rock salt to a certain value, and upon certain terms, the particulars of which it is not material to state at length. The agreement contained a clause for referring any disputed matters to arbitration. The Falks had had dealings with Messrs. Dempsey, Frost & Co., and had made mortgages of the salt mines to Dempsey & Co. with powers of sale. In April, 1849, Thompson & Co., the plaintiffs in the cross suit, contracted to buy up the right of Dempsey & Co. in the mines, for 1,750*l.*; and by arrangements with Dempsey & Co. they paid the money on the 1st March, 1850. On the 7th March, 1850, the Falks instituted a suit against the firm of Dempsey & Co. (to which Thompson & Co. were not parties) to redeem the mortgage to Dempsey & Co.; and in that bill the plaintiffs alleged *that Dempsey & Co. were in fact indebted to them in at least 10,000*l.* In the end, Thompson & Co. paid 2,500*l.* to Dempsey & Co. for possession and for certain other considerations. On the 17th May, 1850, possession was given to Thompson & Co. In the original suit of *Falk v. Thompson*, the Falks insisted that Thompson & Co. were liable to pay certain incumbrances on the mines to Dempsey & Co., and the present cross bill denied any such liability. By their answer to the cross bill, the Falks admitted that before the original bill, they and

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(1) *Bullock v. Cerry* (1878) 3 Q. B. D. 356, 47 L. J. Q. B. 352, 38 L. T. 102.

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Dempsey & Co. had come to an arrangement that in respect to the claim of Dempsey & Co. for about 9,000*l.* against them, the Falks, they should pay 10½*d.* in the pound, making about 480*l.*, and have a full release; and this fact was not stated in the bill of *Falk v. Thompson*. The answer to the cross bill admitted certain documents referred to in the second part of the schedule, to be in the defendants' possession, as to which privilege was claimed; and the grounds of the privilege were set forth fully in an affidavit filed after the answer, the reception of which, as it did not contradict the answer, but merely supplied deficiencies, was not objected to. This affidavit made by R. Falk, one of the defendants, was as follows: "The following documents, mentioned in the schedule to the answer of myself and the above-named defendant, H. E. Falk, filed in the cause, that is to say, 'Rough notes, rough memoranda, and notices and sketches of instructions for solicitor and counsel in the different equity suits; bills, briefs for counsel in the original and supplemental suits in this Court, of *Falk* and others against *Thompson* and others, in complainant's bill mentioned, letters written and sent to the said S. Hughes, (who was defendant's solicitor,) relating to the matters in the complainant's bill mentioned, as well as to other matters of business, in *which the said S. Hughes has acted as the solicitor of the said defendants, cases, and counsel's opinion thereon, and other papers of a confidential nature contained in the bundle referred to in the said schedule, and therein called a bundle of miscellaneous papers connected with the matters in the said complainant's bill mentioned, and also the fifty-eight letters from the said S. Hughes, particularly mentioned and specified in the part of said schedule, entitled 'second part; confidential communications between defendants and their legal advisers,' are all confidential communications which passed between me, defendant, and said defendant, H. E. Falk, or one of us, and our legal adviser acting as such legal adviser, in the course of which communications I, defendant, and said defendant, H. E. Falk, were seeking and obtaining advice from such legal adviser; and they were all written in relation to disputes which, at the time of writing thereof, were pending either between me and the said H. E. Falk of the one part, and said plaintiff of the other part, or between me and said H. E. Falk of the one part, and the defendants, L. Frost and T. Farnworth, of the other part; and some of them relate to litigation then actually pending between me and the said H. E. Falk, of the one part, and said plaintiff of the other

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part, and others of them to the arbitration in the plaintiff's bill mentioned; and others of them to litigation actually pending at the time between me and the said H. E. Falk of the one part, and the said L. Frost and T. Farnworth of the other part."

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The documents referred to by this affidavit were exclusively letters from the defendant's solicitor to one or other of the defendants, commencing in May, 1850, and ending in October, 1851.

Mr. C. Hall, for the plaintiffs, now moved for production of the documents referred to in the second part of the schedule, and in the affidavit above set out.

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Mr. Kinglake for the defendants, [cited *Herring v. Cloebury* (1), *Cromack v. Heathcote* (2), *Lord Walsingham v. Goodricke* (3)]:

The law as now settled by *Pearse v. Pearse* (4), *Follett v. Jefferyes* (5), and *Reid v. Langlois* (6), is, that the privilege is unlimited, wherever the communications pass between solicitor and client, and is not to be confined to the case where the discovery is sought from the solicitor.

Mr. C. Hall, in reply

In this case the litigation between Dempsey & Co. and the Falks, and the litigation between the Falks and Thompson & Co., were not in reference to the assertion of the same right. The litigation, to permit the *rule of privilege to apply, must be with reference to the same dispute: *Holmes v. Baddeley* (7). Here the bill filed by the Falks against Thompson & Co. was for specific performance of the contract of April, 1850. The present cross bill is to set aside an award made under a clause in that agreement, in reference to the payment that ought to be made by Thompson & Co., and there is no necessary connection between the two litigations. In *Follett v. Jefferyes*, and in *Reid v. Langlois*, the privilege is claimed in language showing that the documents related to the matters in dispute either after litigation commenced, or in contemplation of litigation. Here that conclusion cannot be drawn from the language used.

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The following cases were also cited: *Flight v. Robinson* (8), *Woods v. Woods* (9), *Beadon v. King* (10).

(1) 65 R. R. 344 (1 Ph. 91).

(2) 22 R. R. 638 (2 Brod. & Bing. 4).

(3) 64 R. R. 226 (3 Hare, 122).

(4) 75 R. R. 4 (1 De G. & Sm. 12).

(5) 89 R. R. 1 (1 Sim. N. S. 3).

(6) 84 R. R. 207 (1 Mac. & G. 627).

(7) 65 R. R. 427 (1 Ph. 476).

(8) 68 R. R. 6 (8 Beav. 22).

(9) 67 R. R. 16 (4 Hare, 83).

(10) 83 R. R. 283 (17 Sim. 34).

THOMPSON THE VICE-CHANCELLOR :

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The question is, whether the litigation which was pending from the 7th March, 1850, between the Falks and Dempsey, Frost & Co. was or was not a litigation between the plaintiff and defendants in this suit. That suit between the Falks and the Dempseys was to redeem the mines mortgaged by the Falks to them, and the decree in that suit would have been to take an account of the mortgage debt; and the question is, how far the matters in the present suit are the same as in the suit of March, 1850. Now if I could upon authority determine the *abstract point which has been argued, viz. whether the privilege of the client is as extensive as that of the solicitor, I should be glad to remove the anomaly by which it seems that where the solicitor is interrogated, and objects, because it would be calling on him to divulge matters which passed in the relation of solicitor and client, then there is privilege without more, whether such matters relate to an actual or contemplated litigation or not; and yet if the same questions are put to the client, then when his privilege is in question, he is to be told that he has a less privilege than he would have through his solicitor, if the latter were questioned. So great an anomaly, so inconsistent and absurd a rule, I should be glad to take on myself to say is not the rule of this Court, and that there is no such distinction. When *Reid v. Langlois* was cited to me, it did appear at first sight, that it established the broad proposition contended for, and I should certainly have followed that case if it did so; but on further examination, though that case does not establish the contrary, yet I think it was not the intention of Lord COTTENHAM to lay down the general proposition: that point he did not decide; nor do the cases of *Pearse v. Pearse*, and *Follett v. Jefferyes* so lay it down, as to enable me to say I can follow them. If that point is to be decided, it must be by a higher authority than mine.

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But it appears to me that, under all the circumstances of this case, the privilege ought to apply. It is admitted that the documents in question are communications which passed between the 7th March, 1850, and the 30th of October, 1850. The first date is that of the bill filed by the Falks against Dempsey & Co., and the latter is the date of the award made under the arbitration contained in the agreement of the 16th May, *1850, between Thompson & Co. and the Falks. The affidavit in which the ground of the privilege is stated, after enumerating the documents (which are only correspondence, that is, the documents contained in the second part of the schedule), states as follows: "That they are all confidential

communications," &c. (The VICE-CHANCELLOR read the passage in the affidavit set out in p. 578.) The affidavit does not specify which related to the litigation between the Falks and Dempsey & Co., and which related to the litigation between the Falks and Thompson & Co. But they all relate to one or other of those litigations. Now the material question is, whether the litigation between Dempsey & Co. and the Falks, in the suit commenced on the 7th March, 1850, relates to the same matters and refers to the assertion of the same right, with reference to the position of the parties, as the litigation in the present suit. The present suit is to carry into effect the agreement between Thompson & Co. and the Falks of May, 1850, and to set aside the award made in pursuance of the arbitration, and to seek other relief by Thompson & Co. as against the Falks; and Thompson & Co. would have to establish in this suit, what was the position of the Falks in their character of mortgagors. That is also the subject of the litigation in the suit of March, 1850. At that time the present plaintiffs were purchasers of the estate vested in Dempsey & Co. as mortgagees. The litigations are not, it is true, strictly the same; but I think the circumstances of the case come within the principle of those in which the Court has held, that, confidential communications made in relation to matters in contemplation of litigation, in which the issue is the same, ought to be protected. The consequence is, that the documents comprised in the second part of the schedule must be protected from production.

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LONGSTAFF v. RENNISON (1).

(1 Drowry, 28—35; S. C. 21 L. J. Ch. 622; 16 Jur. 557; 19 L. T. O. S. 178.)

A testatrix directed a sum which she said she owed to A. and B. on her promissory note, and her other debts, to be paid. She directed the residue of her estate to be applied towards establishing a school in connection with a certain chapel for the time being, and "to pay the same over to the treasurer for the time being of such school, now or hereafter to be built."

The testatrix did not in fact owe the money to A. and B., but intended it to be held by them on a secret trust for the use of the existing chapel. She did not tell them of this in her lifetime, but told her executor; and A. and B. never knew of the intention till after the testatrix's death:

Held, 1st, on the question of the validity of the residuary gift, that it was

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(1) See now the Mortmain and testators dying after the 5th August, Charitable Uses Act, 1891, as to 1891.—O. A. S.

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not good even as to the personal estate, as it would be a due execution of the trust to devote the money to building a school-house.

2ndly, that whether there was a valid debt or not on the promissory note to A. and B. was a question of law; but if there was no debt, it was good as a legacy.

THE will of Margaret Clay was as follows: "I order and direct particularly the debt of 350*l.* and interest which I owe to the Rev. J. Donald Carrick and the Rev. G. Sample, and for the security of the payment of which I have given them my promissory note payable to them or their order on demand, and all other my just debts and funeral and testamentary expenses, to be paid by my executors hereinafter mentioned;" and then after various gifts she went on thus: "And as to all the rest, residue and remainder of my trust estate, monies, chattels, and premises, after payment of the before-mentioned legacies, debts, and personal and testamentary expenses, and the expenses of proving and carrying into execution of the trusts of this my will and all expenses incident thereto respectively, I will and bequeath and direct my said trustees and the survivors of them, and the heirs, executors, administrators, and assigns of such survivor, to pay and apply the same towards establishing *a school in connection with the Baptist Chapel of North Shields for the time being, and to pay the same over to the treasurer for the time being of such school now or hereafter to be built, whose receipt shall be a good discharge," &c. The will was dated in March, 1844: the testatrix died in May, 1845. The trustees and executors of this will were J. Rennison and another. The will was proved by Rennison alone. A suit was instituted by the plaintiff, the brother and heir-at-law of the testatrix, for the administration of her estate, and a decree was made in July, 1846, under which the Master made his report; and the following are the material facts found by that report. The promissory note mentioned in the will was dated the 28th March, 1844, and was delivered to the defendant Carrick by Rennison in July, 1844, Rennison having received it from Laing, the attorney of the testatrix. The testatrix had made and signed the note freely and voluntarily, and there was no debt due from her either to Carrick or Sample at the time of the making and signing of the note. There was no agreement or understanding between Carrick and Sample and the testatrix as to the mode in which the proceeds of the note were to be applied; nor did either Carrick or Sample do any act, or make, or (in the lifetime of the testatrix) receive, any communication to or from the testatrix or any other person from which any charitable or other trusts of the promissory

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note could be implied. Some time before her death, however, the testatrix informed Rennison that she had made the promissory note, and that it was in the hands of Laing, her attorney; and she authorized Rennison to obtain it and to deliver it to Carrick and Sample; and she told Rennison that she wished the amount to be applied by Carrick and Sample for the use of the Baptist Chapel in Stevenson Street, Tyneworth, and she had no doubt they *would so apply it; but she told him shortly afterwards not to mention her intention to Carrick and Sample till after her death. Rennison gave the note as soon as he received it from Laing, to Carrick; but he did not then, nor did he during the lifetime of the testatrix, inform Carrick or Sample what were the wishes of the testatrix as to the application of the note, and they never were informed, during the testatrix's lifetime, of her wish that the money should be applied for the benefit of the Baptist Chapel; her wishes on this subject were communicated to Carrick and Sample after her death.

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The Master found these facts as special circumstances, and found that the sum of 350*l.* secured by the note was a legacy, but subject to the opinion of the Court.

The cause now came on on further directions, and the questions were, whether the 350*l.* was a debt or a legacy, and whether as a gift for establishing the school, it was void.

Mr. K. Parker and *Mr. H. Clarke*, for the plaintiff:

* * The promissory note is included in the testatrix's description of her debts, and therefore it cannot take effect as a legacy: *Briggs v. Penny* (1). It appears, by the special circumstances *found by the Master, that the testatrix informed Rennison of her having made the promissory note, and delivered it to her solicitor, and that it was her intention to give it on a secret trust, and she directed him to get it and hand it over to the payees. If it is treated as forming part of the residue, it is bad, being given for establishing a school, which imports bringing land into mortmain: *Pritchard v. Arbouin* (2), *Trye v. Corporation of Gloucester* (3).

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Mr. Smythe, for Carrick, the holder of the note:

* * If this is not actually a debt, the will amounts in effect to a direction to the executors to pay it out of her estate; the testatrix falsely recites a non-existing debt, and directs it to be paid. It is

(1) 87 R. R. 192 (3 Mac. & G. 546).

(3) 92 R. R. 71 (14 Beav. 173).

(2) 27 R. R. 106 (3 Russ. 456).

LONGSTAFF clear she meant a payment, and she declares the trusts on which
 R. she intends the payment. That is a good gift : *Schloss v. Stiegel* (1),
 RENNISON. *Rishton v. Cobb* (2), *Giles v. Giles* (3) ; see also *Tate v. Hibbert* (4).
 There is therefore a good debt, or a direction to pay which is
 equivalent to a legacy.

Mr. Lee, for Rennison :

[*32] There is a good claim either for a debt or for a legacy *for the
 benefit of the chapel. For the latter purpose, the residuary gift is
 good, for there is nothing in it making it necessary to lay out the
 money in building, or bringing land into mortmain. (He cited
Att.-Gen. v. Williams (5), and *Att.-Gen. v. Stepney* (6).)

Mr. W. M. James, for the Attorney-General.

Mr. K. Parker, in reply :

* * Here there is no land in mortmain, no schoolhouse already
 erected : if the will is to be carried into effect, land must be got, and
 brought into mortmain.

[*33] The VICE-CHANCELLOR said he was not satisfied of the correctness
 of the Master's finding that the 350*l.* was given as a legacy, and the
 primary question was whether it was a debt. That question his
 Honour thought was purely legal, and must be determined in a case
 to be sent to law, in which the question would be whether at the
 death of the testatrix any and what debt was due from her to
 Carrick and Sample. On the question of the gift *in the residue
 for establishing a school, his Honour continued thus : " There is no
 doubt that whatever of real estate, or of personal estate savouring
 of realty, is given as residue for that purpose, the gift is void. But
 the question is whether the pure personalty comprised in the residue
 is well given for the purpose mentioned." (The VICE-CHANCELLOR
 referred to the residuary clause, and continued :) " Now, the question
 is whether that is void, on the ground that in the execution of the
 trusts, the acquisition of real estate is involved for establishing the
 school. I have been referred to the case of *The Attorney-General*
v. Williams, which is reported in 4 Br. C. C. and better in 2 Cox,
 and I shall refer, in observing upon it, to the better report." (The
 VICE-CHANCELLOR stated the circumstances of the case, and

(1) 38 R. R. 67 (6 Sim. 1).

(2) 48 R. R. 256 (5 My. & Cr. 145).

(3) 44 R. R. 134 (1 Keen, 685).

(4) 2 R. R. 175 (2 Ves. 111).

(5) 4 Br. C. C. 526.

(6) 7 R. R. 325 (10 Ves. 22).

proceeded:) Now in that case there was no gift of the *corpus* to establish the school. It was to pay out of the dividends 90*l.* to the school master, and the overplus of the dividends and proceeds to be applied in buying books, things, &c. ; in effect there was to be no application even of the dividends, to buy land or lodging. It would have been a clear breach of trust to apply the *corpus* to buy land, and that was the ground of the decision. The LORD CHANCELLOR said : “ The Court is tied up to apply those funds in the supply of certain articles for the use of the school, whenever this school shall be established ; but it is clear that no part of the fund is to be applied in building or establishing the school.”

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But in the case before me, the *corpus* is given on trust to pay the same to the treasurer ; and it is true that the school might be established without buying land or building, but the question is, whether it would be a due execution of the trust to buy land. It appears that *there was no school, and I think it would be a due performance of the trust to buy land and build a schoolhouse ; and to apply the money in that way, would be a due application of the money. Further, the testatrix clearly contemplated the building of a school ; for she says the trustees are to pay the same to the treasurer for the time being, of the school now or hereafter to be built. This then is a case in which, although if a schoolhouse were in existence, it would be possible to apply the fund towards establishing a school without buying land ; yet there being no such school, it would be a due execution of the trusts to apply the money in buying land for the purpose. I think, therefore, that this case comes within the statute, and I must declare the gift of the residue as to the personal estate in favour of the school, void.

[*34]

The parties being anxious to avoid the expense of a case to a court of law, referred to the Act 14 & 15 Vict. c. 83, s. 8, and asked the Court to call in the assistance of a common law Judge upon the question of the legal effect of the promissory note. The VICE-CHANCELLOR held that the Act only extended to the Vice-Chancellors, the power formerly held by the LORD CHANCELLOR, and did not extend to the taking from a court of law the consideration of a purely legal question, especially a question connected with the forms of pleading at common law. The parties then by consent elected to take his Honour's opinion on the question whether the 350*l.* was a debt or not, and if not, whether it was a legacy ; and the case stood over on that point.

LONGSTAFF ^{r.} THE VICE-CHANCELLOR on this day gave judgment as follows :

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May 31.

[*35]

The testatrix on the same day on which she made *her will, executed a promissory note for 350*l.*, by which she promised to pay to Carrick and Sample 350*l.* with interest at 5*l.* per cent. for value received. In fact, it was without consideration ; she did not deliver it on the day on which it was made, to the payees, but she delivered it to her solicitor ; and it is proved by Rennison that he was directed by the testatrix to get the note and to hand it over to the payees ; and she communicated to Rennison her purpose as to the disposition of the money, and wished that purpose not to be communicated to Carrick and Sample. On the same day on which the testatrix made the note, she also made her will, and in it she refers to the note in these terms. (His Honour read the passage in p. 582.) So that she describes and recognises the 350*l.* as a debt, and directs that, and all her other debts to be paid. Now, the Master has found that in his opinion the 350*l.* is a legacy, submitting, however, the question to the Court. It is very questionable upon the authorities, whether a court of law would determine this to be a legal debt, and therefore my original determination was to send to a court of law the question whether it is a debt or not. But considering that if it is not valid as a debt, it is valid as a legacy, and as it is immaterial in which way it is taken, that is, whether it is valid as a debt or as a legacy, except that if it is a debt, it is not liable to legacy duty, and takes priority over the legacies ; and as the claimants are willing to take it as a legacy, I think I may affirm the report, and declare that the 350*l.* is a good legacy, and then it will pay duty and have no priority. I must, at the same time, declare that it is due as a legacy on the trusts declared by the testatrix.

1852.

March 27.

M'LEOD *v.* LYTTLETON.

(1 Drewry, 36—41.)

[Obsolete practice as to amendment of bill.]

GIBSON *v.* GIBSON.

(1 Drewry, 42—64.)

Under the old law of dower, a wife taking a legacy under her husband's will was not put to her election by the fact that the will contained a general devise of the testator's real estate to trustees in trust for sale and to pay one fourth part of the proceeds to the widow.

[This case appears to be covered by *Ellis v. Lewis*, 64 R. R. 307 (3 Hare, 310), and as the old law of dower is now practically obsolete it is thought unnecessary to retain the case in the Revised Reports.—O. A. S.]

1852.
Jan. 20, 24,
March 15.
June 12.

WALSH *v.* WALSH.

(1 Drewry, 64.)

An infant's legacy of small amount paid to the father under special circumstances.

1852.
March 12.
KINDERSLEY,
V.-C.
[64]

This was a petition to have a legacy of 100*l.* and arrears of interest, amounting to 93*l.*, belonging to a female infant of the age of ten years, paid to the father.

The petition stated that the father was a small farmer in Ireland, without capital or means of supporting himself and his infant daughter. It stated further, that the petitioner had a relation settled and in good circumstances in Australia, and that the father desired to emigrate to that country with his daughter, and it prayed payment to him of the 183*l.* to enable him to do so. The affidavit in support of the petition verified these statements, and stated further the expenses that would be incurred, showing that the 183*l.* would be scarcely more than sufficient to pay the expenses of outfit and emigration.

Mr. Malins in support of the petition.

The VICE-CHANCELLOR made the order, subject to the solicitors of the petitioner communicating with him personally, for the purpose of undertaking to see that the fund should be duly applied in fitting out and transferring the father and daughter to Australia.

BEALE *v.* TENNENT.

(IN RE CUMMINS.)

(1 Drewry, 65—67.)

1852.
March 19.

[Obsolete law of administration of real estate under 1 Will. IV. c. 47, s. 12, subsequently extended by 11 & 12 Vict. c. 87.]

1852.
May 24, 25.

WRIGHT v. VERNON.

(1 Drewry, 68—72.)

[Obsolete practice. Alteration of record by supplemental bill pending demurrer.]

1852.
June 8, 9.
July 8, 22,
24.
KINDRUSLEY,
V.-C.
[73]

HARVEY v. STRACEY.

(1 Drewry, 73—143 ; S. C. 22 L. J. Ch. 22 ; 20 L. T. O. S. 61.)

A will made by a married woman expressly referred to the power and authority reserved to her by her marriage settlement, under which settlement she had a general testamentary power, which she exercised over part of the settled funds and a special testamentary power over the residue ; also a general testamentary power over certain chattels, some of which were specifically disposed of by the will, which contained a general residuary disposition made primarily in favour of the nieces of the testatrix, who were objects of the special power in the settlement. The will also specifically disposed of certain other chattels over which the testatrix had a general power of disposition under the settlement :

Held, that the special power was well exercised by the will so far as the residuary disposition operated in favour of objects of that power (1).

A testamentary appointment under a special power to a class ascertainable at a future time, which may then possibly comprise persons who are not objects of the power, will be good as to the shares of those members of the class who are objects of the power, and the remaining shares will go as in default of appointment (2).

Where a valid appointment is made to an object of a special power coupled with an invalid attempt to impose limitations on the appointed property in favour of strangers, the original appointment remains absolute and the invalid limitations fail (3).

[*74] THE bill was filed in this case by Sir Robert John Harvey, the surviving executor of the will of Mrs. Morrison, against John Stracey and others, some of whom were *persons claiming under an appointment made by the will of Mrs. Morrison, and others the persons claiming in default of the validity of the appointment.

[A very voluminous pedigree is annexed to the original report, but it does not quite accurately state the facts as found by the Master's report in the suit. The pedigree is consequently omitted, and the effect of the Master's report as to the state of the family is concisely stated *post*, p. 595.]

[75] On the marriage of Mrs. Morrison with Archibald Morrison, a settlement dated the 5th of May, 1823, was made between the said Archibald Morrison of the first part, and Sarah Morrison his wife by her then name and description of Sarah Harvey spinster of the

(1) *In re Huddleston* [1894] 3 Ch. 595, 64 L. J. Ch. 157 ; *In re Farncombe's Trusts* (1878) 9 Ch. D. 652, 47 L. J. Ch. 328.

(2) *In re Beale's Settlement* [1905] 1 Ch. 256, 74 L. J. Ch. 67, 92 L. T. 268.
(3) *Churchill v. Churchill* (1867) L. R. 5 Eq. 44, 49, 16 W. R. 182.

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second part, and the plaintiff and John Stracey, Esq., a defendant in the suit, of the third part, [whereby it was declared that the plaintiff and the said John Stracey should hold certain specified investments transferred to them by the said Sarah Morrison, upon trust out of the income thereof to pay the yearly sum of 500*l.* to the said S. Morrison during the joint lives of herself and the said A. Morrison for her separate use without power of anticipation, and should, after the decease of the said Archibald Morrison, in case he should die in the lifetime of the said Sarah Morrison, transfer the said trust funds to the said Sarah Morrison absolutely. But if the said Sarah Morrison should die in the lifetime of the said Archibald Morrison then should immediately after the decease of the said Sarah Morrison, out of the trust funds raise the sum of 3,000*l.*, and pay the same to such persons as the said Sarah Morrison should, notwithstanding her coverture, by will signed and published by her in the presence of, and attested by, two or more credible witnesses, direct or appoint. And in default of appointment, in trust for such person or persons as under the Statute for the Distribution of the Effects of Intestates would at the decease of the said Sarah Morrison have become entitled thereto as her next of kin in case the said Archibald Morrison had died in her lifetime, and she had died possessed thereof, his widow and intestate; and should, from and after the decease of the said Sarah Morrison, so dying during the life of the said Archibald Morrison as aforesaid, pay the income of the residue of the said trust funds, after raising thereout the said sum of 3,000*l.*, to the said Archibald Morrison during his life, and should, from and after the decease of the said Archibald Morrison, in case of his surviving the said Sarah Morrison as aforesaid, hold the residue of the said trust funds, and the income thereof, in trust for all and every or such one or more exclusively of the other or others of the relations in blood of the said Sarah Morrison at the time of her decease, within the eighth degree of consanguinity to her, as the said Sarah Morrison should, notwithstanding her coverture, by will signed and published by her in the presence of, and attested by, two or more credible witnesses, direct or appoint; and in default of such direction or appointment, in trust for such person or persons as under the Statute for the Distribution of the Effects of Intestates would, at the decease of the said Sarah Morrison, have become entitled thereto as her next of kin, in case the said Archibald Morrison had died in her lifetime, and she had died possessed thereof, his widow and intestate. The

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settlement then declared that the trustees should hold a sum of 54,000 French rentes transferred to them by the said S. Morrison upon the same trusts as the other specified trust funds, but not so as to make more than one annual sum of 500*l.* payable for the separate use of the said Sarah Morrison during the joint lives of the said Archibald Morrison and Sarah Morrison, or more than one sum of 3,000*l.* raisable after the decease of the said Sarah Morrison in case of her dying during the life of the said Archibald Morrison. And by the said indenture the said Sarah Morrison assigned to the said Sir Robert John Harvey and John Stracey all the plate, linen, china, glass, books, pictures, and household goods and furniture which she, the said Sarah Morrison, was then entitled to, in trust to permit the same to be used and enjoyed by the said Archibald Morrison and Sarah Morrison jointly during their joint lives, and after the decease of the said Archibald Morrison, in case he should die in the lifetime of the said Sarah Morrison, in trust for her, the said Sarah Morrison absolutely. But if the said Sarah Morrison should die in the lifetime of the said Archibald Morrison, then to suffer the same to be used and enjoyed by the said Archibald Morrison during his life, and after his decease in trust for such persons as the said Sarah Morrison should, notwithstanding her coverture, by will signed and published by her in the presence of, and attested by, two or more credible witnesses, direct or appoint. And in default of such direction or appointment, in trust for such persons as under the Statute for the Distribution of the Effects of Intestates would, at the decease of the said Sarah Morrison, have become entitled thereto, as her next of kin, in case the said Archibald Morrison had died in her lifetime, and she had died possessed thereof, his widow and intestate. And by the said indenture the said Archibald Morrison covenanted with the said Sir Robert John Harvey and John Stracey that in case the said intended marriage should take effect, he would permit the said S. Morrison at all times thereafter, to have for her separate use, and either in her lifetime or by her will to dispose of to any persons two shares or tickets of which the said Sarah Morrison was possessed in certain public libraries or institutions in Norwich, a ticket of which the said Sarah Morrison was possessed, of admission to the Theatre Royal of Norwich, and all the jewels, watches, and personal ornaments of which the said Sarah Morrison was then possessed. And also all the money and goods, chattels or effects whatsoever which the said Sarah Morrison might save or purchase

out of the income thereby settled for her separate use, or which might arise from the sale or disposition of any of her separate chattels or effects, and all other shares or tickets in any of the public libraries of Norwich, or tickets of admission to the Theatre Royal at Norwich, or jewels and other personal ornaments, or other property or effects whatsoever of a like nature, which the said Sarah Morrison might save or purchase out of her separate income during her intended coverture.]

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Mrs. Morrison duly made her will on the 23rd May, 1825, [as follows] :

[83]

I, Sarah, the wife of Archibald Morrison, of Eaton in the county of the city of Norwich, Esq., do by virtue of the power and authority reserved to me in and by the deed of settlement made on my marriage, and bearing *date 5th of May, 1823, hereby make and publish and declare this to be my last will and testament in manner and form following: that is to say, Whereas, by virtue of the said settlement, I am entitled to dispose of the sum of 3,000*l.* by will immediately on my decease, now I do hereby direct and appoint the same to be paid to the persons, and for the purposes hereinafter mentioned, and I give and bequeath the same as follows, that is to say, the sum of 500*l.* to my nephew Sir Robert John Harvey; the sum of 100*l.* to the Rev. Charles Day who married my late niece Mary Ann Harvey; the sum of 100*l.* to Eliza Lohr, the wife of Mr. Lewis Lohr; the sum of 100*l.* to Mrs. Adams, sister to my husband; the sum of 50*l.* to Hannah Kerrison, the widow of the late Thomas Allday Kerrison; the sum of 19 guineas to Mr. and Mrs. Atkins, now of Doughty Hospital in Norwich, or to the survivor of them. And the sum of 20*l.* to be divided amongst the female servants living with me at my decease, including Mary Sewell, hereinafter mentioned. Also I direct and appoint that the sum of 21*l.* be paid to the treasurer of the Benevolent Society for Decayed Tradesmen in Norwich; the sum of 20*l.* to the treasurer of the Norfolk and Norwich Hospital; the sum of 20*l.* to the treasurer of the Society for liberating Persons confined for small Debts in Norwich, to be by him applied in obtaining the release of any prisoner confined for a small debt in Norwich gaol, and to afford him some assistance upon his discharge, as such treasurer may deem most proper; and the sum of 20*l.* to be distributed by my executors amongst the poor of the parish where I may happen to be resident at the time of my death; all which said legacies I desire shall be paid to the said legatees and treasurers respectively within three calendar months next after my decease. And I direct that the duty on the *legacy

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to the said Eliza Lohr should be paid in addition to her said legacy. And I do desire that in case of the death of any of the said legatees in my lifetime, by which means the said legacies would become lapsed, then that such lapsed legacy or legacies, provided the same do not exceed the sum of 100*l.*, shall be paid to my said husband for his own absolute use and disposal. And I do further direct and appoint that my executors hereinafter named do and shall, out of the said sum of 3,000*l.*, raise a competent sum of money to produce the annual sum of 25*l.*, and place the same in Government or real security during the natural life of my servant Mary Sewell, whether she shall be in my service or not at the time of my decease, and do pay the said annuity to the said Mary Sewell during her life as the same shall from time to time become due for her own use. And from and after the decease of the said Mary Sewell, then I desire that the sum of money so invested for securing the said annuity shall become part of the residue of my personal estate. And I direct and appoint that all the remainder of the said sum of 3,000*l.*, together with the said sum of money set apart for securing the annuity to the said Mary Sewell, in case she shall die in the lifetime of my said husband; and also any sum of money which I may save from and out of the annual sum of 500*l.* reserved to me by my said settlement in the nature of pin money, if the same shall exceed 1,000*l.*, shall be severally continued out at interest by my said executors or the survivor of them during the life of my said husband, and that he shall be at liberty to receive the interest or dividends thereof as the same shall arise, during his life for his own use, and from and after his decease, then that the said several last-mentioned sums shall become part of the residue of my personal estate. But in case such savings shall not exceed 1,000*l.*, then I

*give all such savings to my said husband absolutely. Item, I do hereby nominate, constitute, and appoint my said husband Archibald Morrison and my said nephew Sir Robert John Harvey to be executors of this my last will and testament. Item, I give and bequeath unto my said husband for his life all the benefits and advantages to be derived from my shares of the Norwich public library and the Norwich Literary Institution, and my ticket of admission to the Theatre Royal of Norwich, and also the use of my books during his life; and after the death of my husband, I give my share in the public library to my niece Judith the wife of Charles Turner, if then resident in Norwich, if not, then to my nephew Roger Kerrison Harvey, and my shares in the Norwich

Literary Institution to the Rev. Charles Day ; my ticket of admission to the Norwich Theatre to my niece Sarah the wife of William Herring ; and my books to be equally divided amongst my nephew Roger Kerrison Harvey, my great-nephew Charles Day, and my great-niece Louisa Day. [The testatrix then proceeded to give a great number of specific bequests of jewellery, personal ornaments, plate and other effects, and she disposed of her residuary personal estate as follows :] I give and bequeath unto my said husband all the rest of *my household furniture, household linen, common china, and all other articles for domestic and culinary purposes. And after payment of my just debts, funeral expenses, the charges of proving this my will, and of carrying the trusts thereof into execution, I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue, and remainder of my monies and other my personal estate, of whatever description the same may be, unto and amongst all and every the daughters of my said brother, John Harvey, the said Charles Day, and Louisa Day, the children of my deceased niece, and the two daughters of my said brother Charles Savill Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided amongst them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my nieces who may be dead, shall only be entitled to the share in the said residue which his or her mother would have had if living at the death of my said husband. And further it is my will that the shares of each of my said nieces of the residue of my personal estate shall be placed and continue out at interest by my surviving executor, his executors or administrators, on Government or real security during the respective lives of my said nieces, and the dividends or interest on each share as the same shall from time to time become due, shall be paid to each of my nieces during her life, on her own receipt, for her own sole and separate use, and not to be subject to the debts or control of her present or any future husband. And as to the share of my niece Caroline Onley (1), I will and desire that the same shall, after her decease, be paid to all my other nieces who shall be living at the decease of the said Caroline Onley, and to the issue of such of them

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[*88]

(1) Caroline Onley predeceased the testatrix's husband (Archibald Morrison) and consequently took no share,

so this gift over of her prospective share failed.—O. A. S.

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as shall then happen to be dead *equally, share and share alike; but the issue of any deceased niece is only to be entitled to the share which his or their mother would have had if living at the decease of the said Caroline Onley; and after the death of each of my other nieces, I direct that the dividends and interest of her share shall, if she die married, be paid to her husband during his life, for his own use. And I further will and direct that, after the several deceases of my said last-mentioned nieces, or their respective husbands, that the share of each of the said last-mentioned nieces shall be paid to her child, children, or grandchildren, or any other relation in blood to my said niece, in such parts and proportions, manner and form as she may, by her last will and testament duly executed, and which she shall have power to make, notwithstanding her coverture, give and bequeath the same; and in default thereof, then unto the next of kin in blood of my said niece, according to the Statute of Distribution of Intestates' Personal Estates. And I do further direct that, in case any of my said legatees shall be minor or minors at the time they may be respectively entitled to the several legacies, then that my surviving executor, his executors or administrators, shall continue the respective legacies, which they shall be entitled to under this my will, out at interest on Government or real security, until they shall attain their respective ages of twenty-one years. And that my said executor, his executors or administrators, do and shall apply the dividends or interest of the shares of the said Charles Day and Louisa Day for their benefit during such minority; and that the interest or dividends of the shares of my other legatees shall be suffered to accumulate by way of compound interest until they respectively attain the said age of twenty-one years, and shall be paid to them at that time in addition to and together with their original shares. And I do hereby expressly declare that my excluding *my nephews from participating in the residue of my personal estate has not arisen from any want of regard or affection for them, which I sincerely feel, but from considering them amply provided for by other means.

[*90]

And she made several codicils, of which the 2nd, 3rd, and 7th were as follow :

The 2nd codicil. It is my desire that a sum necessary to produce 12*l.* per annum be vested in Government securities, to be given half-yearly to since deceased since deceased (1), and to her sister Maria

(1) *Sic* in original report.

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Atkins, now resident at Hackney, formerly of Norwich, the daughters of the late Thomas Atkins, cabinet-maker and chair-maker, and of Mary his wife, my much-loved and respected nurse, with the benefit of survivorship. Should there not be sufficient principal money out of the 3,000*l.* allotted for my payment of legacies, after the payment of my other bequests made in my will, I desire all there is to spare may be vested as aforesaid, for the purpose of producing an annuity for their joint use and benefit, not omitting the benefit of survivorship. Mary Atkins being dead I wish the money to be invested for Maria Atkins, her sister, sufficient to produce 12*l.* per annum.—SARAH MORRISON, Eaton Hall, January 30, 1826.

The 3rd codicil. Should they both die in the lifetime of my dear husband, of course the annuity to revert to him for his life, and after his death, the principal to revert to Sir Robert John Harvey of Monshold House, though differently specified in my will.—SARAH MORRISON, Eaton Hall, January 30, 1826.

The 7th codicil. Upon glancing over my will I do not *see I have mentioned them, on account of my dear father having made them an allotment of part of my property. I therefore hope they will accept as a testimony of my remembrance the trifling legacy of 25*l.* each after the death of my beloved husband, wherewith to purchase some memento of their now sick and affectionate sister.—S. MORRISON. I would have left it at my decease, but am limited in my means. I am not well—my hand shakes, Dec. 1, 1826.—SARAH MORRISON, Eaton Hall. God bless my dear brothers.

*91]

Mrs. Morrison died on the 15th of February, 1827.

The will and codicils were proved by Archibald Morrison and the plaintiff. Archibald Morrison died on the 1st May, 1848. The other material facts relating to the state of the family [are stated in the Master's report in the suit, from which it appears that the said Sarah Morrison, at her decease, left only two brothers her surviving, viz. the said John Harvey and the said Charles Savill Onley (formerly Charles Harvey), and no children or child of any deceased brother or sister, that the said John Harvey died on the 9th of February, 1842, leaving the defendants Roger Kerrison Harvey and John Ranking his executors, and that the said Charles Savill Onley died on the 31st of August, 1843, leaving the defendant Onley Savill Onley his executor. The said John Harvey had eleven daughters, three of whom predeceased the testatrix, Sarah Morrison, having died in infancy and unmarried. Another of these eleven

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daughters (Mrs. Day) predeceased the testatrix, leaving but two children, the defendants Charles Day and Louisa Day, named in her will. Louisa Day married the Rev. W. H. Blake and died in 1843, in the lifetime of Archibald Morrison, leaving one child, Henry Blake, born in 1843, who was also a defendant to the suit. Another of the eleven daughters, Caroline Mary (the wife of the defendant Onley Savill Onley), also survived the testatrix, and died in 1845, in the lifetime of Archibald Morrison, leaving three daughters and a son, three of whom were born in the lifetime of the testatrix, and survived Archibald Morrison, some of whom were defendants to the suit, and the remaining six daughters of John Harvey, all born in the lifetime of the testatrix, were defendants to the suit. The said Charles Savill Onley had only the two daughters referred to in the will, namely, the defendant Judith (the wife of C. R. Turner) and Sarah, the wife of William Herring. Mrs. Herring died in 1828, in the lifetime of Archibald Morrison, leaving five children, all of whom were born in the lifetime of the testatrix and were defendants to the suit.

The bill was filed in April, 1849, by the surviving executor of the testatrix Mrs. Morrison, for carrying into execution the trusts of her will.

[97] Under the decree and subsequent orders the Master made his report, dated the 19th day of June, 1851, and thereby,] as to the property comprised in the settlement, he found that the trust funds comprised in the indenture of the 5th day of May, 1823, and over which the said Sarah Morrison had a power of appointment among her relations in blood, consisted of 20,963*l.* 7*s.* 11*d.*, 2,039*l.* 6*s.* 10*d.*, and 346*l.* 4*s.* 7*d.* Bank 3*l.* per Cent., making together the sum of 23,348*l.* 19*s.* 4*d.* Bank 3*l.* per cent. Annuities, then standing in the name of the Accountant-General, in trust in the two first mentioned causes, and the sum of 7,000*l.* 3*l.* per cent. Reduced Annuities, also standing in the name of the Accountant-General in trust as aforesaid, and thirty shares in the Westminster Gas Light Company, which remained unsold. And as to the state of the testatrix's property at the time of her death, he found that the said Sarah Morrison died on the 15th day of February, 1827. And he found that the said Sarah Morrison was on the 23rd day of May, 1825, (the date of her said will,) possessed of the following personal estate, (that is to say) the sum of 772*l.* 2*s.* 6*d.* in cash in the hands of her bankers, Messrs. Harvey and Hudsons of Norwich, the same being the savings of her separate income,

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certain household furniture, plate, linen, china, books, and jewellery, which, at the decease of the said Sarah Morrison, were valued by Mr. William Butcher of Norwich, auctioneer, at the sum of *716*l.* 10*s.*; an absolute and unrestricted power of appointment under her said marriage settlement over the sum of 3,000*l.* payable at her death to such persons as she should by her will appoint. And he found that the said Sarah Morrison on the 15th day of February, 1827, (the day of her death,) was possessed of the following personal estate, viz., the sum of 992*l.* 7*s.* 10*d.* cash in the hands of her said bankers, Messrs. Harvey and Hudsons, being part of the savings of her separate income; the sum of 500*l.* stock, in the 3*l.* 10*s.* per cent. Reduced Bank Annuities, the aforesaid household furniture, plate, linen, china, books, and jewellery, which at her decease were valued by the said William Butcher at the sum of 716*l.* 10*s.*, and the above power of appointment under her said marriage settlement of the said sum of 3,000*l.*

The cause now came on to be argued, and the first question, which it was agreed should be argued independently, was, whether the power of appointment was executed at all; if it was, then there was another question between the next of kin and the appointees, whether the execution was not, to some and what extent, void for excess.

Mr. Follett and *Mr. Busk*, for the plaintiff, stated the nature of the case, and submitted the questions to the Court.

Mr. Kenyon Parker and *Mr. Haynes*, for R. K. Harvey, the representative of J. Harvey, one of the brothers of the testatrix, [argued that the special power was not executed except as to the 3,000*l.* On this point they cited *Denn v. Roake* (1), *Hughes v. Turner* (2), *Jones v. Tucker* (3), *Clogstoun v. Wallcott* (4), and other cases.] The power in this case is to dispose of a large residue. Now there are four powers to be executed, but the will refers not even to the testatrix's powers generally, still less to the several powers specifically, but in terms to one power only. She does not name either the trustees or the trust fund. Secondly, they referred to the clause in the settlement, pointing out the degree of consanguinity at the time of Mrs. Morrison's decease, and said the appointment could not be extended to persons who might not be living at the death of the appointor. The execution of the power

['99]

(1) 33 R. R. 1 (5 B. & C. 720).

(3) 33 R. R. 12, 13 (2 Mer. 533).

(2) 41 R. R. 171 (3 My. & K. 666).

(4) 60 R. R. 396 (13 Sim. 523).

HARVEY WAS therefore excessive. [They cited also *Davies v. Thorus* (1),
 v. STRACEY. *Bennett v. Aburrow* (2), *Lewis v. Llewellyn* (3), *Napier v. Napier* (4).]

[*100] *Mr. L. Oliver*, for the representative of C. S. Onley, followed in the same interest as the representative of J. *Harvey, [and contended that the delegation of the power was an excess and bad].

Mr. Campbell and *Mr. T. C. Wright*, for five nieces of the testatrix :

The appointment is good. There is an immediate power over the 3,000*l.*, and another over the residue, and the testatrix deals with both. She has specifically disposed of every specific chattel which she has power to dispose of, and her appointment would have nothing to operate upon but the residue. * * There is a portion of the appointment to the husbands of the nieces, which is no doubt bad, but that does not destroy the validity of the rest of the appointment. [They relied also on *Carver v. Bowles* (5), *Ring v. Hardwicke* (6), *Bailey v. Lloyd* (7), and distinguished *Hughes v. Turner* (8) and *Clogstoun v. Wallcott* (9).]

[101] *Mr. L. Wigram*, and *Mr. Law*, for Mrs. Bellman, another niece of the testatrix :

[102] * * It is said that when the testatrix gives the shares of her nieces, after their deaths, over to their children, grandchildren, or other relations in blood, &c., that is too remote ; but the effect is merely to vest the interest absolutely in the nieces : *Sadler v. Pratt* (10).

(THE VICE-CHANCELLOR : The argument against the execution was not remoteness, but that the objects must be within the eighth degree of consanguinity and living at the death of Mrs. Morrison, and that the limitation here is to the nieces and to the issue of such of them as shall be then dead.)

But if all the excess is cut down, still the remaining part is good. They referred also to the second and third codicils.

(1) 84 R. R. 344 (3 De G. & Sm. 347).

(2) 7 R. R. 131 (8 Ves. 609).

(3) 23 R. R. 201 (1 T. & R. 104).

(4) 27 R. R. 144 (1 Sim. 28).

(5) 34 R. R. 102 (2 Russ. & My. 301).

(6) 50 R. R. 202 (2 Beav. 352).

(7) 29 R. R. 30 (5 Russ. 330).

(8) 41 R. R. 171 (3 My. & K. 666).

(9) 60 R. R. 396 (13 Sim. 523).

(10) 35 R. R. 192 (5 Sim. 632).

Mr. Keen, for the children of *Mrs. Belmont*, one of the testatrix's nieces, contended that *Mrs. Belmont's* share (if the power was executed) was cut down to a life estate, with remainder to her children: *Phipson v. Turner* (1).

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Mr. Walker and *Mr. C. Hall*, for the representatives of the children of *Sarah Herring*, a deceased niece of the testatrix, who died after the testatrix, and before her husband :

* * The primary objects of the execution of the powers are the nieces ; not only they can take under it, but none can take with them. All other parties who would take at all must take by substitution only: *Gray v. Garman* (2). The appointment is to all the nieces. If all the nieces had died without issue, they would have taken vested interests, which shows that the nieces are the persons to be benefited. The explanation she gives for excluding her nephews, shows that she was referring to a fund of considerable magnitude: such an explanation would have been unnecessary if she were speaking of the residue only of so petty a fund as the 3,000*l.* (They referred to *Elliott v. Elliott* (3).)

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Mr. Bacon, for *C. Day*, a son, and *Blake*, an infant grandson of a niece, also in support of the execution of the power. * * *

Mr. Russell and *Mr. Rogers*, for other parties, in the same interest. * * *

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Mr. Bailey and *Mr. E. Turner*, for other parties, [supporting the execution of the power].

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Mr. Bigg, for children of *Caroline Onley*.

Mr. K. Parker, in reply.

* * * * *

On the 9th of June the VICE-CHANCELLOR delivered the following judgment :

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The question here is, whether the will of a married lady operates as an execution of a power given to her by her marriage settlement. The will was made before the Wills Act, in the manner required by the law as it then stood, and it was executed with the forms required by the power. The circumstances are these : On the marriage of *Archibald Morrison* with *Sarah Harvey*, considerable personal

(1) 47 R. R. 229 (9 Sim. 227).

(3) 74 R. R. 88 (15 Sim. 321).

(2) 62 R. R. 107 (2 Hare, 268).

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property belonging to Miss Harvey was settled. There was also some property, but of less amount, settled by Mr. Morrison ; that is not the subject of the power. The property of the lady consisted chiefly *of stock and of some French rentes, some shares in a Gas Company, and other property consisting of plate, linen, furniture, books, &c., and jewels, and other articles of that description. By the settlement, 20,000*l.* South Sea Annuities, 7,000*l.* 3*l.* per cent. Reduced Annuities, 3,150*l.* 4*l.* per Cents., together with some shares in the Westminster Gas Company, were assigned to trustees in trust to pay an annuity of 500*l.* a year to the wife for her separate use, during the lives of herself and her husband. The rest of the dividends to be paid to the husband and wife during their joint lives. If the husband died first, the whole to the wife ; there was no limitation to the children. If the wife died first, then she had power to appoint thus : 3,000*l.* on her death was to go to such persons as she should by will appoint ; in default, to her next of kin ; so that as to the 3,000*l.* she had a general power to appoint (in the event of her dying first) by will, as she pleased, to take effect on her death. As to the remainder of the fund, other than the 3,000*l.*, the interest was to go to the husband during his life, if he survived her ; and after his death the principal was to go among such of the wife's relations, not exceeding the eighth degree of consanguinity, as she should by will appoint ; and in default of appointment, to her next of kin. So that there was a general power to take effect immediately on her death as to the 3,000*l.* As to another part of the fund, there was a special power to take effect after the husband's death, in favour of the wife's relations within the eighth degree of consanguinity. As to both portions of the aggregate fund, a limitation in default of appointment to the wife's next of kin to the exclusion of the husband. There was also a sum of French rentes, a considerable sum, settled in the same way, so however as not to increase the annuity of 500*l.* given to the wife, and not to increase the 3,000*l.* *There are thus far, therefore, two portions of property, the subject of two distinct powers, using that term in its technical sense. The plate, linen, china, and household goods and furniture were assigned to trustees on trust that the whole of it should be enjoyed by the husband and wife during their joint lives, and if the husband died first, absolutely to the widow ; but if she died first, they were to be enjoyed by the husband for life, and the remainder was subject to a general power to the wife to appoint by will, so that there was a general power of

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appointment over the plate, &c., to take effect after the husband's death. The fourth portion of the property, viz. two shares in two public institutions at Norwich, a ticket of admission to the Norwich Theatre, and jewels, watches, &c., were dealt with by the settlement thus: The husband covenanted that the wife should be allowed to enjoy them during her life, and by will, or other writing, to dispose of them as she should think fit; a general power therefore over that portion of the property, to take effect immediately after her death, and the covenant also extended to and included all that the wife might save out of the 500*l.* a year settled upon her for her separate use.

Now I shall treat this matter, so far as relates to the wife's power, as a case of four different portions of property, viz., 1stly, 3,000*l.* over which there is a general power to take effect on the wife's own death; 2ndly, the residue of the stock and funds, the bulk in fact of the property, over which there is a special power to take effect in favour of a particular class on the husband's death; 3rdly, the plate, furniture, &c., over which she had a general power to take effect at the husband's death; 4thly, the shares in the public institutions, the ticket of admission, the jewels, &c., and the wife's *savings, as to which there is a general power to appoint by will, or during her lifetime, to take effect after the wife's own decease. The settlement was made on the 5th May, 1823; the marriage took place immediately after. There were no children of the marriage. Two years afterwards, viz. on the 23rd May, 1825, Mrs. Morrison executed the will on which the questions before me arise. The will sets out by a clause which is of great importance. It is thus: "I, Sarah, the wife of A. Morrison, do, by virtue of the power," &c. [His Honour read the introductory clause: see *ante*, p. 591.] She not only refers to the instrument creating the power, but says that she makes the will accordingly by virtue of the power and authority reserved to her by the settlement. She then proceeds to recite the particular power to dispose of the 3,000*l.*, "Whereas by virtue," &c. She then gives a series of legacies to various persons by appointing portions of the 3,000*l.*, amounting in the whole to about 1,000*l.*; she gives besides an annuity of 25*l.* a year to an old servant, for paying which she directs a sum to be set apart; and then she proceeds, "and from and after the death of the said M. Sewell, then I desire that the sum of money so invested for securing the said annuity shall become part of the residue of my personal estate." She then proceeds with this clause, by which she refers not only to

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the 3,000*l.*, but also to a part of the fourth portion, viz. the savings which she may make out of her separate estate. "And I direct and appoint," &c. (His Honour read the clause in p. 592, ending "I give all such savings to my husband absolutely.") I may here observe as to the savings out of her separate estate, that to enable her to dispose of that she required no special power. Still the settlement deals with that so as to profess to give her power to dispose of it as well as of her jewels, &c. Thus far, exclusive of the general reference *to the settlement, and the power in virtue of which she makes her will, we find a special reference to the power to dispose of the 3,000*l.*, and a disposition of it; and a disposition of part of another portion, without any specific reference to the particular power affecting that portion. She then names as her executors her husband and Sir R. Harvey, and then without specifically referring to any of the powers, she proceeds to dispose of part of the property comprised in the fourth portion, and part of that comprised in the third. "I give and bequeath unto my said husband for his life," &c., her shares in the Norwich Public Library and the Norwich Literary Institution, and the ticket of admission to the Theatre of Norwich, &c. Indisputably, here she appoints to her husband absolutely, part of the property comprised in the fourth portion, and for his life a part of the property comprised in the third portion; and as to both these portions she speaks of them as hers—"my shares of the Norwich Public Library, my ticket of admission, the use of all my books during his life." She then proceeds to dispose in favour of particular individuals, of her jewels, &c., part of the property comprised in the fourth portion, and that disposition is to take effect immediately on her death. She then disposes of a portion of the property comprised in the third portion, viz. the plate, &c., which she describes as my plate, and as to that of which she so disposes, comprised in the third portion, she carefully gives it after the death of her husband. She then proceeds to dispose, but still only after the death of her husband, of other parts of the same portion of property; and she then gives four legacies of 200*l.* each, to four of her nieces, and she directs those legacies to be paid six months after the death of her husband, or within six months "of my death, if I survive him;" and then she says, "I give to my husband *all the rest of my household furniture, household linen," &c., part of the third portion of property.

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Then comes the ultimate gift on which the principal question turns. Now, as I have already said, there are four distinct portions

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of property over which there are different powers of disposition; besides the general reference to the settlement and to the general power, there is a specific reference to the power to dispose of the 3,000*l.* and a disposition of it. There is, without reference to any specific power, an actual disposition of part of the property contained in the third and fourth portions, but as yet there is no specific reference to the special power over the second portion, nor any gift out of that portion of the property. Unless by what follows she does exercise her power of disposition over the second portion, she has not disposed of it all. Now the clause in question is this: "And after payment of my just debts, funeral expenses," &c. (His Honour read the clause, p. 593, appointing the residue down to, and including the clause, "but it is my will that the said Charles Day and Louisa Day," &c.) Now here I pause for a moment to consider the effect of this clause. By the preceding part of the will and settlement, the husband had a life interest in all the property. Thus far the husband had by the will or settlement a life interest in every part of the property, the subject of the settlement. Now she proceeds to give, after his death, what she describes as the rest and residue of my monies and other my personal estate. Now no doubt, the terms "my monies and other my personal estate" do not in themselves include property over which the testatrix had only a power of appointment. But here she professes to give her monies, &c., and adds the words "I direct and appoint," &c., and she so directs *and appoints to persons who are within the description of the persons in whose favour the specific power was created; viz. relations within the eighth degree. Now the question is, whether this clause (taken with what follows) operates as an execution of the power of appointing the property comprised in the second portion: that is, all the remainder of the stock, &c., after setting apart the 3,000*l.* out of it.

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The question whether a will (duly executed) operates as an execution of a power is a question of intention, and the Courts have determined that there are only two modes in which the intention can be collected. The first is by the will referring to the power, and expressing an intention to execute it, though not referring to the property; the second, by dealing with the specific property, though not referring to the power. The proposition is accordingly well settled that there must be a reference either to the power or to the property comprised in the power. I am, therefore, to determine this question as to the property comprised in the second portion. Did the testatrix intend to execute her power as to three portions of the property, the smaller portions of it, (which

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she clearly did,) and not to execute it as to the other portion, comprising the great bulk of the property? She sets out by stating that she makes this testamentary instrument by virtue of the power. Now it appears to me that unless there is something rendering it almost impossible to suppose that as to some particular portion of the property, she meant to execute the power, that clause alone leads strongly to the conclusion that she did intend to exercise the power as to all.

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It is argued upon that, that she refers to the power, while she had in fact, four powers; and it is said she does not *say she makes her will by virtue of the four powers, but by virtue of the power; and then she proceeds to recite expressly one of the powers. Now no doubt, in technical language, this lady may be said to have had four powers. But substantially it may be said with equal accuracy, that she had one power to dispose of four portions of property; she had no power to make a will at all (otherwise than as to her savings), except as she had it by force of the settlement, and she says by virtue of the power "I do," &c.: and then, although she only mentions specifically one of the powers, or to use another form of language, the power to dispose of one portion of the property, she does, without reference to the power to dispose of the third portion and fourth portion, actually dispose of them. Now, if her referring to the power to dispose of the first portion is a reason for inferring that she did not intend to dispose of the second, it is equally a reason for inferring that she did not intend to dispose of the third and fourth: but I am precluded from such an inference, by the fact that she has disposed of them. It does not, then, appear to me that the fact of the testatrix referring (after the general reference at the commencement of the will) to the particular power as to the 3,000*l.*, and not referring expressly to the other powers, is a reason why we are to conclude that there was not an intention to execute the power to dispose of the second portion. But I find that when she disposes of the remainder of the property comprised in the third and fourth portions, she uses, with regard to that, the same language as in the clause relating to the second portion; viz. she speaks of my shares, &c. Now it has been held repeatedly that if there is a reference to the power, and the will purports to be made in pursuance of the power, it is not necessary to describe the property, but the expression "my personal estate" is sufficient.

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Suppose *there had been no power but the power to dispose of the second portion, and the will had said, "by virtue of the power I make my will," and had then said, "I give all my money," surely

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upon the authorities, that would be sufficient to operate as an execution. Am I to say that because there is a power to dispose of four portions of property, and the testatrix refers to the power in the singular, I must hold that there is no reference to the power to dispose of the second portion? The real question is this: It being admitted that there is no reference to the property itself comprised in the second portion, is there here a reference to the power to dispose of that portion? I think there is a reference to the power, and that when she uses the words "power and authority," she does it in the sense of the power and authority given by the settlement to make a will, disposing of the various portions of property comprised in the settlement; I am therefore of opinion, so far as regards the property comprised in the second portion, and without any doubt upon the subject, that the testatrix did intend to execute her power over that portion; and it is not immaterial to observe that with reference to every portion of property which she professes to dispose of, she always has regard to the question whether, by the terms of the settlement, her power could be exercised to take effect immediately on her own death, or only on the death of her husband, he surviving her. Then it is said that by this residuary clause she makes the property subject to the payment of debts, and that shows she had no intention to execute her power, because she had no right by the power to charge debts; but it must be considered what is contained in this gift. First, there is the bulk of the stock, the second portion; but there is more; she had, when disposing of the 3,000*l.* given out of, it about 1,000*l.*; and she had directed that what should be set apart to answer the annuity should be part of her *personal estate; and she directs, that what should remain of the 3,000*l.* and the fund set apart to meet the annuity, and also her savings out of her separate estate, should go to her husband for his life, and after his death, all that was to be part of the residue of what she calls her personal estate, so that what she disposes of as my monies, as to part of it, included some property which she is disposing of only by virtue of the power given by the settlement. Now the whole property was originally hers, and still was hers after the settlement in this sense, that there is no limitation to children. She looked upon it as hers, and this is not matter of conjecture, for she tells you that the property in the settlement she calls hers; she speaks of my plate, my books, &c.; and she winds up the whole by saying that a certain portion of what she has given shall fall into the residue, and she gives it all after the death of her

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husband to go to the persons within the prescribed degree of consanguinity. I think this is a stronger case than most of the cases of valid execution of a power; it is stronger than *Churchill v. Dibben* (1), which has only, comparatively, recently been made public.

However, it would be useless for me to go through all the cases; it is sufficient to say that the principle is well established; that it is a question of intention, and there must be a reference either to the power or to the property; and it would be a loss of time to compare the language of the different instruments on which the decided cases have turned. I have gone through the cases cited to me and many others, and I have, upon considering them, arrived at the conclusion, that if ever there was a case in which an intention to execute a power *was shown, this is that case; and my opinion is, that this will be a valid execution of all the powers, that is, of the power and authority to dispose of all the portions of the property.

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Now to consider another part of the case, viz. that having in the commencement assumed to appoint that which she describes as the remainder of my monies to certain persons, or rather to certain classes, she afterwards goes on to deal with the shares appointed in a particular way. She first provides for the daughters of her brother John, her nieces, a class described; next she provides for Charles Day and Louisa Day, children of a deceased niece; thirdly, for the two daughters of her brother, C. S. Onley; that is three classes, the daughters of John Harvey, the two children named of her deceased niece, and the two daughters not named of her brother Charles; and their shares are to go to such of them as shall be living at her husband's death, and to the issue of such of them as shall be dead.

Now I ought not to assume a possibility almost beyond possibility,—that, at the death of the husband, any of the nieces living at his death should have died leaving great-grandchildren of great-grandchildren, which would be requisite to bring their issue beyond the eighth degree. Thus far, then, the limitations are within the power, and thus far there is an absolute appointment. But then she says further, that the shares of her nieces shall be

(1) A case decided by Lord KENYON in or about the year 1754, and reported in a note in 9 Sim. 547, where it was held that as the will of a married woman was necessarily made in execution of a power, it might consequently operate as an execution of a

general power over her own real estate without any specific reference either to the power or to the property. There are later cases upon the same point which were differently decided: see *A.-G. v. Wilkinson* (1866) L. R. 2 Eq. 816, 14 L. T. 725.—O. A. S.

invested for their separate use, and so far again there is nothing exceeding the limits of the power.

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She then proceeds to direct the settlement of the shares in favour of persons who are not objects of the power; that is, after the deaths of her nieces, the income *she appoints to their husbands, and subject thereto the principal to their children or grandchildren, or any other relation in blood to her nieces, as they may appoint. Now I need not say that the nieces may have blood relations who are not relations of the testatrix. We have then an appointment to the husbands and to persons who are not within the prescribed class, but who are equally objects of appointment with other relations of the blood of the nieces who may be within it. Now when an appointment is to a class, some of whom are within, and others are not within, the proper limits of the power, if the class of persons is ascertained, so that you can point to A., who is within the limits, and say so much is to go to him, though the others are not within the limits, yet the appointment to A. shall take effect; but if the appointment is to a class, some of whom may, and others may not, be objects of the power, and there is nothing to point out what portion is to go to those who are within the power, and what to those who are not, the whole fails. I think therefore that here the limitations attempted to be engrafted on the shares of the nieces by settlement are void, except the limitation to their separate use for their lives, and, as to Caroline Onley's share, the limitation over to the other nieces and their issue on her decease.

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(His Honour was proceeding to dispose of the question what would be the effect on the limitations, in themselves good, if they stood alone, of their being coupled with limitations in excess of the power, when he was reminded that it had been agreed that the question of the effect of the appointments should not be argued till the question whether the power had been exercised at all, should have been decided. The Court having now decided that, the remaining points were still to be argued; the case accordingly stood over till the 12th July, when *the questions between the appointees and the next of kin, and the appointees *inter se*, were argued.)

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Mr. K. Parker and *Mr. Haines*, for the representatives of John Harvey, who would be entitled in default of appointment:

We are entitled at any rate to everything attempted to be

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appointed after the life estates of the nieces; the intention was to appoint to the nieces, not absolutely, but only for life. The persons to whom an attempt is made to appoint in remainder, are not capable of taking; but that failure cannot enlarge the original gift; and the unappointed part, viz., the remainders over, go to the next of kin.

But we say the effect of the language of the appointment goes much further. The appointment is to a class who shall be living at the husband's death; some of the appointees might be, and in fact were, and some of them might not be, and in fact were not, living at the husband's death. Now a gift to an unascertained class, some of whom may be capable of taking, and some not, is altogether bad. *Sadler v. Pratt* (1) will be cited against this, but that case is distinguishable from the present. There the class was ascertained at the death of the appointor; here it cannot be ascertained till the death of the husband. [They cited *Routledge v. Dorril* (2), *Jee v. Audley* (3), *Lassence v. Tierney* (4).] As to the share of Caroline Onley, this point arises: she died in 1845, before the testatrix's husband. She therefore could take nothing, and her share is unappointed, and goes to the next of kin.

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Mr. L. Oliver argued in the same interest, for the representatives of the other next of kin.

Mr. L. Wigram and *Mr. Law*, for *Mrs. Bellman*, cited *Burrell v. Baskerfield* (5).

Mr. Campbell and *Mr. T. C. Wright*, in support of the appointment to the nieces:

There is primarily a good appointment to the nieces absolutely. The attempt to cut that down fails; if it fails as to the intended appointees, it fails also in destroying the antecedent well appointed interests; it is in fact a nullity, and the original gift absolutely to the nieces, is left subsisting.

Mr. Walker and *Mr. C. Hall*, for the persons representing the children of *Sarah Herring*, who died after the testatrix and before her husband, cited *Shuttleworth v. Greaves* (6), *Viner v. Francis* (7),

(1) 35 R. R. 102 (5 Sim. 632).

(2) 2 R. R. 250 (2 Ves. 356).

(3) 1 R. R. 46 (1 Cox, 324).

(4) 84 R. R. 158 (1 Mac. & G. 521).

(5) 83 R. R. 251 (11 Beav. 325).

(6) 48 R. R. 5 (4 My. & K. 35).

(7) 2 R. R. 29 (2 Cox, 190).

Gray v. Garman (1), *Salisbury v. Petty* (2), *Winckworth v. Winckworth* (3).

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Mr. Bailey, Mr. Edward Turner, Mr. Bacon, Mr. Bigg, Mr. Wetherell, and Mr. Keen, for other parties.

Mr. K. Parker, in reply.

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The following cases were also cited in the course of the arguments: *Tytherleigh v. Harbin* (4), *Bebb v. Beckwith* (5), *Trower v. Butts* (6), *Smither v. Willock* (7).

On the 22nd July, the VICE-CHANCELLOR delivered the following judgment:

In this case of *Harvey v. Stracey*, it having been determined that the testatrix, Mrs. Morrison, intended to execute that power which was given to her by the settlement in respect of what is in the settlement called the residue of certain property, what I have now to determine is, what is the effect of the appointment which she has made or purported to make of that portion of the property. The first question that has been raised is a question respecting the construction of the power itself. The power is in this form: The trustees are, after the death of Mr. Morrison, in case of his surviving his wife, to stand possessed of the fund in question, and the dividends, interest, and annual produce thereof, in trust for all and every, or such one or more, exclusively of the others or other of the relations in blood of the said Sarah Harvey at the time of her decease, within the eighth degree of consanguinity to her at such age, day, or time, or respective ages, days, or times, and if more than one in such shares and proportions, and with such annual sums of money, and future, or executory, or other *trusts, such annual sums of money, and future, or executory, or other trusts being for the benefit of the said relations in blood of the said Sarah Harvey, within the degree aforesaid, or some or one of them, and in such manner as the said Sarah Harvey shall, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils in writing, or any writing or writings in the nature of or purporting to be a will or codicil, to be signed and published by her in the presence of, and to be attested by, two or

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(1) 62 R. R. 107 (2 Hare, 268).

(5) 50 R. R. 188 (2 Beav. 308).

(2) 64 R. R. 206 (3 Hare, 86).

(6) 24 R. R. 164 (1 Sim. & St. 181).

(3) 68 R. R. 205 (8 Beav. 576).

(7) 22 R. R. 127, n. (9 Ves. 233).

(4) 38 R. R. 121 (6 Sim. 329).

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more credible witnesses, direct or appoint. Now it is contended that although the appointment must be made originally to relations living at the time of her decease within the eighth degree of consanguinity, yet that it is competent under this power to Mrs. Morrison to engraft any limitations or any charges on the property she may thus appoint, in favour of persons who, being relations within the eighth degree of consanguinity, might not be living at her decease; in other words, that the restriction of the class to persons living at her decease, does not apply to the subsequent part of the power, but only to the prior part of it. I confess it appears to me there is no ground for questioning the construction of the power. The settlor meant that it should be appointed among the relations of Mrs. Morrison within the eighth degree of consanguinity, living at her decease; and having described that class of persons, she afterwards mentions the said relations in blood within the degree aforesaid. Now supposing that the power had been to appoint to relations living at the death, and afterwards there was mention of the said relations, surely that would mean the relations living at the death; there it is the relations within the eighth degree living at the death, and then afterwards the said relations within the degree aforesaid. I have no doubt that the meaning is, that the limitations which it *is competent to the appointor to make, or the charges which she may create upon the fund, were required to be to the same class of relations as the original appointment, viz. to relations within the eighth degree living at the death of Mrs. Morrison; and that any appointment to relations not living at her death, although within the eighth degree, is invalid and cannot take effect, as being made to persons who were not appointees designated by the power.

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That being, in my opinion, the construction of the power, the next question for consideration is, what is the effect of that part of Mrs. Morrison's will, which in the first instance purports to execute this power. I leave out of consideration, for the present, the subsequent part of the will, by which, after having made an appointment, she proceeds to direct how the shares thus appointed shall be settled. Now, in the first instance, the appointment is made in favour of the following description of persons: All and every the daughters of my brother, John Harvey, Charles Day, and Louisa Day, *nominatim* (they being children of a deceased daughter of John Harvey), and the two daughters of my brother, Charles Savill Onley. I stop there to consider what class would

be included in that description. The question is, whether that description would or would not include any daughters of the brother, John Harvey, who might be born after the death of the testatrix. Now the first question for consideration is, what would be the construction of those words if, instead of their being used in an appointment under a power, they were used by the testatrix in bequeathing her own property. Supposing she had bequeathed her own property after the death of her husband, Mr. Morrison, to all and every the daughters of her brother, John Harvey, and the two Days, *nominatim*, *and the two daughters of Charles Savill Onley, would or would not that include any daughters of John Harvey who might be born after the death of the testatrix? Now the plain rule, I may say the universal rule, in such a case as this, is, that where a bequest is made to the children of A. at the death of another person, or at a future period, all the children of A. who shall come into existence before the period of distribution shall be included in that bequest. Now in this case, by the very terms of the settlement which created the power, Mr. Morrison, the intended husband, had a life interest in this portion of the property; and then the power being to appoint after his death, the testatrix appoints to all and every the children of her brother, John Harvey, that is, appoints at the death of her husband to all and every the children of John Harvey. If that had been a bequest by a testator of his own property, there is no doubt it would have included every daughter of John Harvey who might come into existence after the death of the testatrix and before the death of Mr. Morrison, which was the period of distribution. Now this rule applies not only to the case when the period of distribution is postponed until the expiration of a life estate created by the testator himself, but to the case where he has only a reversionary interest expectant upon a life estate previously subsisting, and then disposes of the fund to take effect after the death of the tenant for life, as in this case. That was held in the case of *Walker v. Shore* (1), by Lord ELDON. He said, the distinction attempted between the case where the gift is to the children living at the expiration of a life, where the life interest is created by the testator himself, and the case where the testator has only a reversionary interest expectant *upon an existing life estate, is too thin; and the same rule applies to the one as to the other; and this rule of letting in all members of the class who shall come into

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existence before the period of distribution, is so strong that it must prevail even in a case in which the Court thinks it very probable that the testator meant to confine the bequest to children living at his death. That was expressly laid down by Lord ELDON in that same case of *Walker v. Shore*. But it is contended that in this case the terms of the bequest itself present reasons for putting a different construction upon this, even if it had been the case of a bequest; for it is contended that inasmuch as in this case the bequest (or rather in this case the appointment, but I am treating it at present as if it had been a bequest of the testator's own property,) is to all and every the children of my brother John and to the two Days *nominatim*, and to the two daughters of my brother Charles; it is contended that inasmuch as she mentions the two daughters of my brother Charles, meaning of course two daughters who were then existing, and whom she then knew and meant to designate as individuals, therefore the same construction must be applied to the bequest to the daughters of her brother John. It is said that it is unreasonable to suppose that she meant differently with respect to the daughters of her brother John, from that which she clearly meant as to the daughters of her brother Charles; for that as to the daughters of her brother Charles she clearly meant to include only the two who were then living. Now even if this argument were sufficient to raise in my mind an impression that the testatrix probably did mean to include only the daughters then living, yet even in that case, on the authority of Lord ELDON's opinion in *Walker v. Shore*, I should still be obliged to adhere to the rule which has really become *a canon of construction. But so far from this argument appearing to me to arise from the circumstances upon which it is founded, it appears to me that they afford an argument directly the contrary way; for if she meant to include only the daughters of John then living, as well as only the daughters of Charles then living, why in describing what daughters of Charles she meant to take should she carefully mention "the two daughters of my brother Charles," and in the very same sentence, in describing what daughters of John she meant to take, use language which seems carefully intended to extend the description to all the daughters of John, whether they should then be living or not? Besides, the argument for excluding any after-born daughters of John is based upon the assumed probability that the testatrix had the same intention with respect to the daughters of John as she had with

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respect to the daughters of Charles. That is the basis of the argument; and yet the argument, even if it were successful, would still fail to work out this assumed parity of intention with regard to the daughters of John and the daughters of Charles, for it is clear that if a daughter of John had been born between the date of the will and the death of the testatrix, such daughter of John must necessarily have been included in the bequest, even assuming that daughters born after the death of the testatrix might be excluded; the gift must necessarily include all the daughters of John alive at the testatrix's death; but with respect to the daughters of Charles, by the very terms of the bequest to those daughters, which terms are "to the two daughters" of Charles; if Charles had had a daughter born between the date of the will and the death of the testatrix, that daughter would be excluded. If we are to assume that the testatrix had the same intention with respect to the daughters of John as she had with respect to the *daughters of Charles, which is the whole basis of the argument, the only construction which could give effect to that supposed intention would be to limit the words "all and every the daughters of John," to daughters living at the date of the will. That is a construction which it would of course be impossible to maintain, and indeed none of the counsel have attempted to suggest any such construction. If then this had been the bequest of a testatrix's own property, I think it quite clear that all the daughters of John, who might be born at any time before the fund became distributable by the death of Mr. Morrison, would be entitled to share; can I then put a different construction upon the terms of the will because this is a case not of a bequest of a testatrix's own property, but of the execution of a power? Suppose the power had been a general power, that is, to appoint to any body that the testatrix pleased, it is clear I could not have varied the terms of the bequest in order to give it effect; I must put the same construction upon the terms as I should have put upon them if it had been a bequest of the testatrix's own property. But then it is contended that I ought to put a different construction on the words in the present case, in order to make them fit on to the terms of the power, *ut res magis valeat*. Now it does appear to me, I confess, that when the testatrix in executing a power, has adopted language which, when used in an ordinary case of bequest, has a natural, reasonable, and appropriate meaning, a meaning so invariably applied to it by the Courts, that it has become a canon of construction,

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it would be most dangerous to wrest that language to a different meaning, for no other reason than that by so doing we shall make it better suit and fit on to the power. I know of no authority that would justify me in so doing; on the contrary, it has been decided over and over again, that it cannot be done *even for the purpose of preventing an appointment being altogether invalid on account of remoteness; and that is a case surely in which the argument *ut res magis valeat* would apply much more strongly than to the present case. I am of opinion that I must apply to the language of the testatrix, the same construction which it would receive in the case of an ordinary bequest, and hold that any daughter of John, born after the death of the testatrix and before the death of Mr. Morrison, when the fund would become distributable, would be included in the terms of the appointment. I have abstained from laying any particular stress upon these words "all and every the daughters of John," because in my opinion the construction would have been the same if those words had not been there; but I cannot help thinking that the introduction of those words "all and every," tends very much to negative the supposition that the testatrix, giving to all and every the daughters of John, did not mean to include all and every the daughters of John.

Being then of opinion that the testatrix has in fact appointed or attempted to appoint the fund to all the daughters of John, including those who might come into existence at any time before the death of Mr. Morrison, and to the two Days, and to the two daughters of Charles, I have next to consider the question what issue of those persons are comprised in the description, "and to the issue of such of them as shall then happen to be dead;" that is, at the death of Mr. Morrison, because it is given to all and every the daughters of John and the two Days, and the two daughters of Charles, or such of them as shall be living at the death of Mr. Morrison; and then come these words which I have now to consider, "and to the issue of such of them as shall then happen to be dead."

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What issue, I say, would *be included in that appointment or in that bequest? I think there can be no doubt whatever that this description cannot properly be limited to the issue of those daughters living at the testatrix's own death, but that it must include all the issue who might come into existence at any time before the death of Mr. Morrison. The result then is this, that whereas the objects contemplated by the power are confined to persons living at the

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testatrix's own death, the persons or class of persons to whom the testatrix has appointed the fund or attempted to appoint the fund, comprise or might comprise persons not living at her death; that is, comprise or might comprise persons not being objects designated by the power. Indeed, it is obvious that it might have happened that not one of the persons to whom the testatrix intended to appoint and did appoint in terms, might have been an object of the power; for, by the terms of the appointment, no one could take who should not be living at the death of Mr. Morrison; and it might have happened that all the daughters of John and Charles living at the testatrix's death, and all their issue living at her death, and the two Days, might have died before Mr. Morrison, and at his death there might have been living only after-born daughters of John and after-born issue of some of the deceased daughters, not one of whom would have been within the scope of the power. Now the events that actually happened were these: First of all, there was no daughter of John born after the date of the will or after the death of Mrs. Morrison; one of the daughters of John had died leaving children; one of the two daughters of Charles had died leaving children, and Louisa Day, one of the two Days named in the will, who had married Mr. Blake, had also died, leaving a child. Two of the children left by the deceased daughter of John (that is, Mrs. Onley) were living at the testatrix's death, one was *en ventre sa mère*, and two others were born after the testatrix's death. With regard to the children left by Mrs. Herring, the deceased daughter of Charles, there were five of them, and all five were living at the death of the testatrix, and therefore objects of the power; and with regard to the child of Mrs. Blake (that is, Louisa Day), that child was born after the testatrix's death, therefore that child was not an object of the power. So that of the persons alive at Mr. Morrison's death, who were described in the description of persons or class of persons in whose favour the appointment was made or purported to be made, some were objects not designated by the power, as having been born since her death. They were all, however, within the power, so far as being all within the eighth degree of consanguinity. In this state of things the following points have been insisted on by the counsel for the next of kin of the testatrix, who would be entitled in default of appointment by the terms of the settlement. First, they say with respect to the appointment in favour of the daughters of John, and the two Days, and the two daughters of Charles, or such of them as should be living at the death of Mr. Morrison, that

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as this would have included daughters of John, who might have been born after the testatrix's death, that is, as it would have included persons not being objects designated by the power, the appointment is altogether void on that account *ab initio*, although it turned out that there were no such persons. And secondly, they contend with respect to the appointment in favour of the issue of such of those as might be dead at the death of Mr. Morrison, that as these not only would have included, but actually did include, issue born after the testatrix's death, that is, persons not being objects of the power, the appointment becomes void on that account. Therefore the *abstract questions to be decided are these : first, is an appointment which is made to take effect at a future period, void *ab initio*, because it may, when that period arrives, include persons not being objects designated by the power ; and secondly, does such an appointment become void *in toto*, because it turns out, when the period does arrive, that it actually does include persons not being objects of the power. Now the authorities upon these two questions do not go quite to the precise extent of distinctly answering those questions, but with their assistance, and calling in aid some conclusions which I think cannot be controverted, it appears to me that it is not difficult to solve these questions. The case of *Sadler v. Pratt* goes at least to this extent, that an appointment made in favour of persons, some of whom are objects of the power, and others not, might be valid *quoad* the shares appointed to objects of the power, although void as to the rest. That was distinctly decided in *Sadler v. Pratt*. But it is contended on the part of the next of kin, that that case does not govern the present, because there the appointment, which was made by will under a power, was to take effect immediately on the death of the appointor, and therefore at the moment when the will executing the power came into operation, the person in whose favour the appointment was made were ascertained ; and it was very well known which of the objects was capable of taking, and what share each would take ; whereas in the present case, every thing must be kept in suspense until the death of Mr. Morrison ; for until that event happens, it could not be known who the appointees would be, or which of the appointees would be capable of taking as objects of the power, or what shares they would respectively take as objects of the power, or what shares they would respectively take by virtue of the appointment. Is it then essential, for that is the question that is thus raised, *is it essential to the validity of an appointment, that these matters

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should be capable of being ascertained at the moment when the will exercising the power comes into operation by the death of the testator? That it is not so will, I think, be made apparent by suggesting a few very simple cases. Suppose a fund settled in trust for A. for life, and after his death in trust for such of A.'s children as he should by will appoint—a very common case of power. Supposing that he by will appoints equally among such of his children as being sons should attain twenty-one, or being daughters should attain twenty-one, or marry under that age; and he dies leaving several infant children. Could it be contended for a moment that that appointment would not be perfectly valid? It is clear it would not be too remote; it would be perfectly valid; and yet in that case, which is one of the simplest that can be suggested, at the death of the appointor it cannot be ascertained who will take under the appointment, or in what shares they will take, because it cannot then be ascertained, inasmuch as the children are still infants, which of them being sons will attain twenty-one, or which of them being daughters will attain twenty-one or marry under that age; therefore it cannot be ascertained until a future period what persons will take under the appointment, or in what shares they will take. Now in the same supposed case of a fund settled in trust for A. for life, and after his death for such of his children as he should appoint, let me introduce another ingredient into the terms of the appointment, and suppose he appoints one moiety of the fund to such of his children as, being sons, should attain twenty-one in equal shares, and the other moiety to such of his daughters as should attain twenty-one or marry under that age, in equal shares. There again the appointment would, beyond all controversy, be valid, and *yet there it would be impossible to ascertain, until a future period, who would take either of those two moieties. And suppose it should turn out, in the case that I have last suggested, that some of the sons did attain twenty-one, but no daughter attained twenty-one or married under that age, what would be the effect? The effect would be that it would be perfectly valid and good as to the appointment of the one moiety among the sons who did attain twenty-one, but of course there would be no appointment as to the other moiety by reason of there being no daughters living to attain twenty-one or marrying under that age. Now I will suppose another case not quite so simple. Suppose the fund settled in trust for A. during his life, and after his death in trust for such of the children of B., another person, as C. should by will appoint. If C. by his will

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appoints the fund in equal shares to such of the children of B. as shall be living at the death of A., and then C. dies in A.'s lifetime, of course it could not be doubted that that would be a good appointment. But it would be in suspense until the death of A. which children of B. will be living. It cannot be ascertained until a future period, namely, the death of A., which children of B. will take under the appointment, and yet it cannot be suggested but that that would be a perfectly valid appointment. So again, in the same case, if C. by his will were to appoint the fund in this way, to such of the daughters of B. as, at the death of A., shall be living, and have children then living, in such shares as shall be in proportion to the number of their respective children then living, which would be a very reasonable and rational appointment; and if there should be no daughter then living and having children then living, then among the sons of B. in equal shares. That would be a good appointment, and yet, though putting a somewhat more *complicated case, you cannot ascertain who will take, whether it will be daughters or sons, in what shares they will take, how many there will be, how many will take at the death of A.; and yet I am putting a case where there can be no question as to the validity of the appointment. In all these cases, if you apply the test of importing the same limitations into the instrument creating the power, which is the test of the validity of the appointment, they would be perfectly good and valid limitations, and there is no reason why they should not be good and valid limitations when created by the appointment under the power; yet in all these cases it is left in suspense until a future period who are the persons who will become the appointees, and in what shares they will respectively take. If, then, an appointment by will is not void by reason that the appointees, who are to take by virtue of the appointment, or the shares which they are to take, cannot be ascertained until a future period, and if moreover an appointment is not void *in toto* by reason that some of the persons in whose favour the appointment is made are not objects designated by the power, as decided in *Sadler v. Pratt*; it seems to follow, first, that an appointment which is made to take effect at a future period is not void *ab initio*, because it may, when that period arrives, include persons not being objects of the power; and secondly, that an appointment made to take effect at a future period does not become void *in toto*, because it turns out, when that period arrives, that it actually does include persons not being objects of the power. But then it has been

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argued, on the part of the next of kin, that the case of *Jee v. Audley*, and the case of *Routledge v. Dorrill*, are authorities the other way. Now those two cases were decided entirely upon the ground that the attempted limitation was void for remoteness. *Indeed with respect to *Jee v. Audley*, as reported by Cox, it does not appear to have been a case of appointment under a power at all; Cox states it as a simple bequest of the testator's own property, but whether it was the case of an appointment or a bequest, the limitation was held void in *Jee v. Audley*, merely because the property was given to a class of persons who could not be, or at all events might not be, capable of being ascertained within the period of a life or lives in being at the death of the testator, and twenty-one years after; in other words, it was void for remoteness. *Routledge v. Dorrill* was the case of an appointment under a power to a class of persons who might not be ascertained within the period of a life or lives in being at the date of the settlement which created the power, and twenty-one years after. In accordance with the well-known rule which I have already adverted to, that an appointment under a power will be void for remoteness, whenever the same limitation, if contained in the instrument creating the power, would be too remote, if you introduce the limitations created by the appointment into the instrument creating the power, and see whether those limitations in the settlement would be bad, then they will be bad when created by the appointment; but if they are good when thus introduced into the settlement itself, they would be perfectly good and not too remote when created by the instrument which exercises the power of appointment. Now in this case of *Routledge v. Dorrill*, by the marriage settlement creating the power, a particular fund was settled after the death of the husband and wife in trust for the children and grandchildren or issue of the marriage, in such shares and proportions, manner and form, as the husband and wife should by deed appoint, or as the survivor should by deed or will appoint. The wife being the survivor, by her will appointed *different portions of the fund thus, each several portion was appointed, at least those upon which the question turns were appointed, to one of her daughters for life, and after her death to her children in equal shares. Now the persons designated by the power were children and grandchildren, or issue of the marriage. The testatrix appointed it to children for their lives, to daughters for their lives, and after their deaths to children, to their children, that is, to grandchildren of the marriage. Therefore the persons

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in whose favour the appointment was made were entirely within the class designated by the instrument creating the power; but why was it held void? The appointment was held void, not because it comprised or might comprise persons not designated by the power, but because the appointment comprised or might comprise persons who could not be ascertained until after the period prescribed by the rules relating to perpetuities, because it would include by its terms all the children of any daughter, not limited to all the children of the daughter living at the death of some person who was alive when the power was created by the settlement, but it would include children of a daughter who was born after the death of the persons exercising the power; that is, after the death of some person living at the date of the settlement, and for that reason it was held void. The ground of the decision had nothing to do with the question whether the class in whose favour the appointment was made was or was not confined to the same persons in whose favour the appointment could be made by the terms of the power, but simply on the ground of its being too remote. Now apply to this case the test of importing into the instrument creating the power, the limitations attempted to be created by the instrument exercising the power, and then it would stand thus: a limitation by the settlement in trust for *the husband and wife for their lives; after their deaths to unborn children for their lives; and after their deaths to the children of those unborn children. Obviously that is too remote. Now apply the same test to the present case. (I am now confining myself to this portion of the will, I am not going into the ulterior attempt to settle the shares, but I am confining myself to the earlier part of the appointment in which she appoints shares to certain classes.) Applying that test, how would the limitations stand in the instrument creating the power? It would be a limitation to Mr. Morrison for his life; after the death of Mr. Morrison to the daughters of the testatrix's brother John, and the two Days, and the two daughters of her brother Charles, or such of them as should be living at the death of Mr. Morrison (a person in existence at the date of the settlement), and to the issue of such of them as should be then dead. That would confine all the persons intended to take, including the issue intended to take, to those who were living at the death of Mr. Morrison; for neither could any daughter of John or Charles, or either of the Days, take unless living at the death of Mr. Morrison; neither could the issue of any persons who died in the mean time take

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unless living at the death of Mr. Morrison. So, by the terms of the appointment, limitations are created, which, if imported into the original settlement, are perfectly valid on the question of remoteness, by reason that they are all to take effect; that is, that all the persons to take must be ascertained at the death of Mr. Morrison, Mr. Morrison being a person who was in existence at the time when the power was created by the settlement. Now it appears to me that the true rule applicable to the matter now under consideration is this: If a fund is appointed to objects of the power, that is, if in that respect it is correct, the appointment will be *valid, notwithstanding that the persons who are to take as appointees, or the shares and interests which they are to take under the appointment, are made contingent upon a future event, provided the contingency must happen within the period prescribed by the rules relating to perpetuities; and if the fund is appointed not entirely to objects of the power, but partly to strangers, it will be still valid *quoad* those who are the objects of the power, and the appointment will fail only as to those persons who are not objects of the power. Applying that rule to the case now before me, as the appointment made (by this part of the will of Mrs. Morrison) is so made that the persons who according to its construction are to take under it, and the shares they are to take must necessarily be ascertained, and the interests vested, at the death of Mr. Morrison, who was alive at the date of the settlement creating the power, the appointment is therefore perfectly valid *quoad* the shares or interests which are thereby appointed to persons coming within the class designated by the power; but it is of course invalid so far as it appoints shares to persons not coming within that class.

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I have hitherto considered only the first part of this appointment without reference to those subsequent clauses in which the testatrix attempts to tie up and settle the shares which are appointed to the niece, by the prior portion of that will; and I now proceed to consider the effect of those subsequent clauses.

The testatrix, having made this appointment of shares to these persons answering a certain description, directs that the share of each niece shall be placed out at interest by her executors, and the income of the shares *paid to her niece for her life, for her separate use. And as to the particular niece, Caroline Onley, her share is to go at her death to all the testatrix's other nieces who should be then living, and the issue of such of them as shall be then dead, share and share alike, the issue taking only the parent's share.

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That applies only to the share of Caroline Onley; then as to each of the other nieces, she directs that after the death of the niece the interest of her share shall be paid to her husband during his life, and after the death of the niece and her husband, then her share is to go to the child, children, or grandchildren, or any other relation in blood of the niece, in such parts and proportions, manner and form, as the niece shall by will appoint, and in default of appointment then to the next of kin in blood of the deceased, according to the Statute of Distribution.

Now, in this attempted restriction and limitation, the direction for the payment of the income of the share to the niece, for her separate use during her life, is perfectly unobjectionable. Passing by for a moment the directions given as to the share of Caroline Onley, the limitations to the husbands of the other nieces are invalid, because they are not objects of the power, they are strangers, and this limitation in favour of the children and grandchildren, or other relations in blood of the nieces, and the limitations in favour of the next of kin, are, in my opinion, all void for remoteness, because, it would not, or at least it might not, be possible to ascertain who would take under those limitations within the period of a life or lives in being at the date of the settlement creating the power, and twenty-one years afterwards. With respect to the direction as to Caroline Onley's share, viz. that that share shall, upon her death, go over to the other nieces or their issue, I am of opinion that

[*139] *all the directions contained in this part of the will were intended to apply only to the share which any niece would actually take, would actually become entitled to, under the prior appointment; so that if Caroline Onley, by surviving Mr. Morrison, had become entitled to a share, this direction would have applied to her share; but, as she never became entitled to any share at all under the prior appointment, this direction as to her share cannot take effect but in accordance with the prior provision, her issue are appointees in her place. It will be recollected that, by the prior appointment as to every share, including Caroline Onley's, that is, not excepting Caroline Onley's, if the niece is not living at the death of Mr. Morrison, the issue of the niece are specified. That was the case with Caroline Onley. She was not living at the death of Mr. Morrison; her issue are specified, and they are the actual appointees by virtue of the prior appointment. I am of opinion, therefore, that this direction as to Caroline Onley's share is inapplicable, by reason that Caroline Onley never had a share. Then

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the attempted limitations in the settlement of the shares of the nieces being invalid, excepting only the direction as to the shares being in trust for their separate use respectively, but the limitations after their deaths being invalid, it is contended, on the part of the next of kin, that the nieces who were living at the death of Mr. Morrison are only entitled to a life interest in these respective shares, and that, subject to such life interest, each of those shares is unappointed; that is, that the attempt so to limit them over is void, and therefore that those shares, after the death of each niece, are unappointed, and will go to the next of kin of Mr. Morrison, as in default of appointment. Now, upon the authority of *Carrer v. Bowles* and *Kampff v. Jones*, both of which cases have been cited at the Bar, I am clearly of opinion *that, under the prior

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clause of appointment, a clause of definite and precise appointment of shares, each niece living at Mr. Morrison's death took an absolute interest in the share appointed to her, and that the attempt made by the testatrix to settle such shares having failed, the absolute interest of the niece remains unaffected, except to the extent that during her life the share is to be held in trust for her separate use.

A subordinate question arises with respect to Charles and Louisa Day. It can hardly be called a question, but it is necessary to state what, in my opinion, is the fact with respect to those two persons. Those two persons, Charles and Louisa Day, it will be recollected, are specifically named as appointees in the prior clause. They were children of a niece of the testatrix, who had died before the date of the will. Now, at the death of Mr. Morrison, at which time the appointment is to take effect, Charles, one of the two Days, was living, but Louisa, as I have stated, who had married Mr. Blake, had died, leaving an infant child, Henry Blake, who was living at the death of Mr. Morrison, and is still living. Now, by an express direction in the will, Charles and Louisa Day were only to take between them the share which their mother, Mrs. Day, the deceased niece of the testatrix, would have taken if she had been living. If she had been living, she would have been one of the daughters of John, who would have taken under the appointment, and therefore they are to take the share only between them that their mother would have taken. That is, each is to take only half a share. Then Louisa, that is, Mrs. Blake, having died before Mr. Morrison, according to the intention of the testatrix expressed, her child would take her share, that is, her half share; but the

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child of Mrs. Blake is incapable *of taking, not being alive at the time of the death of the testatrix, and therefore that half share, as unappointed, goes to the next of kin in default of appointment, and Charles Day of course takes his half share as well appointed.

The practical result then of the whole will be this: The property must be divided into ten equal shares; one of such tenth shares is well appointed to each of the six daughters of John Harvey, and the one daughter of Charles Onley, who survived Mr. Morrison; another of such tenth shares is appointed, as to one moiety, to Charles Day, and as to the other moiety it is attempted to be appointed to the child of Mrs. Blake; such appointment is valid as to the former moiety appointed to Charles Day, and invalid as to the latter moiety. Another of such tenth shares is appointed, or attempted to be appointed, to the five children of Caroline Onley, in equal shares. Such appointment of that tenth share is valid as to three of those children, that is, the two who were born before the testatrix's death, and the one who was *en ventre sa mère*, and invalid as to the two others who were born after the testatrix's death; so that as to three-fifths of that tenth share, they are well appointed, and two-fifths of that tenth share are unappointed. That disposes of nine of the tenths. The remaining tenth share is well appointed to the five children of Mrs. Herring, the deceased daughter of Charles, in equal shares, all of those children being alive at the death of the testatrix. So that that which is unappointed, and will go to the next of kin in default of appointment, will be one moiety of a tenth share, and two-fifth parts of another tenth share, and that I believe disposes of the whole of the case.

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Mr. Bacon referred to the gift to "Charles Day and Louisa Day, the children of my deceased niece, and the two daughters of my said brother, Charles Savill Onley, or to such of them as shall be living at my husband's death," and asked whether the Court had considered, with regard to this gift, the question of joint-tenancy.

The VICE-CHANCELLOR said he had not overlooked it; he thought it was not a joint-tenancy, because the two Days were among the persons in whose favour the appointment was made in the first instance. It is made in these terms: "I direct and appoint, give and bequeath, after the decease of my said husband, all the rest, residue," and so on, "unto and amongst all and every the daughters of my said brother, John Harvey, and the said Charles Day and

Louisa Day, the children of my deceased niece, and the two daughters of my said brother, Charles Savill Onley, or to such of them as shall be living at my said husband's death, and to the issue of such of them as shall then happen to be dead, to be equally divided among them, share and share alike. But it is my will that the said Charles Day and Louisa Day, and the children of any other of my nieces who may be dead, shall only take their parent's share." His Honour thought it clear that the words "share and share alike" applied not only to the issue, but to all the daughters of John, to the Days, and to the two daughters of Charles; otherwise there would be a joint-tenancy among all the daughters of John.

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STACEY.

With reference to the children of Caroline Onley, it was, after the judgment had been delivered, pointed out that there were only four, and that one of those four was born after the death of the testatrix, and died before the death of Mr. Morrison; and the VICE-CHANCELLOR was of *opinion that that child did not take an interest. The effect therefore was that the tenth share, which would have been Caroline Onley's, if she had survived Mr. Morrison, was divisible into fourths, and the appointment would be valid as to three-fourths of that tenth in favour of the three children living at the death of Mr. Morrison, and inoperative as to the other fourth.

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ANDERSON v. NOBLE.

(1 Drewry, 143—150.)

1852.
March 11.

[Obsolete practice as to dissolving the common injunction against proceedings at law.]

BROUGHAM v. SQUIRE.

(1 Drewry, 151—164.)

1852.
June 26.

A., being the holder of several policies of insurance on the life of B., and being unable to keep them up, entered into an agreement with C. for the purpose of C. keeping them up. The agreement consisted of three instruments: first, a letter, written by A. to C. and accepted in writing at the foot signed by C., by which it was stated that C. was to pay the premiums, and to have his advances and interest secured by a deposit of the policies, a bond, and an equitable mortgage of certain estates. No time was specified for the repayment of the advances and interest. Secondly, a bond for 6,000*l.*, given by A. to C., referring to the letter, for repaying the advances and interest at the expiration of six months from the death of B. Thirdly, an agreement in writing, signed by A., also referring to the letter and to the deposit of the policies to secure the payment of the advances and interest

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at the expiration of six calendar months from the death of B., by which agreement the advances and interest were secured to be paid at six months after the death of B., upon certain estates :

Held, first, that, upon the true construction of the three instruments, C. had no security on the policies available till after the expiration of six months from the death of B.

[This case turned exclusively upon the construction of three written documents which presented no particular difficulty, and the report does not appear to have any practical application to any other case.—O. A. S.]

1852.
July 3, 5.

MAJOR v. MAJOR.

(1 Drewry, 165—175.)

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A., being indebted to B., C., and D., three sisters, who were his near relations, partly on his own account and partly as executor of his father, executed to them a bond for 500*l*. At the time of the giving of the bond, A. objected to give it, and agreed to do so, only on a verbal representation that it was not intended to be enforced unless B., C., and D. should come to want,—an event which did not happen. The bond remained in the hands of the three till the death of B., and after her death, in the hands of the survivors, and after the death of C., in the hands of D., whose property (by mutual arrangements) it was at the time of her death. On the bond was found the following endorsement: “This bond is never to appear against A. Witness, C., D.”

This was dated eleven years after the date of the bond.

It was not made clear that C.’s name was written by herself: it was said that D. had written it. It was, however, proved that if D. had written it, she did so with the authority of C. :

Held, that, without saying whether the endorsement amounted to a release, which was a legal question, there was an equity under the circumstances against enforcing the bond; that, if put in suit, the action would be restrained; and that there was nothing due on the bond to the estate of D.

This was a suit to administer the estate of Mary Robinson. It now came on upon exceptions to the Master’s report, and the substantial question before the Court was, whether a certain bond given by one Peter Knight, to Winifred Robinson, Jane Robinson, and Mary Robinson, which eventually became the property of Mary Robinson, was released at law, and if not, whether there was any equity against its being enforced.

The real and personal estates of Winifred Robinson, Jane Robinson, and Mary Robinson, were conveyed and assigned by them, in 1830, to Thomas Major the elder, since deceased, and the plaintiff, Thomas Major the younger, upon various trusts, which it is unnecessary to set out. The result of them was, that under *mutual wills which the three sisters made, Mary, who was the survivor, became eventually entitled to the whole, and her will took effect on the whole, the bond in question included. Peter Knight

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v.
MAJOR.

was, on and before 1831, indebted to the Misses Robinson, on his own account, in a sum of 120*l.*, and as executor of his father, in a sum of 370*l.*; and the sisters pressing for some security, a bond was finally agreed to be given by him for 500*l.*, and the bond was executed on the 26th August. It was a common money bond, and on it was found endorsed, at the death of Mary Robinson, the following memorandum: "This bond is never to appear against Peter Knight. Witness, MARY ROBINSON, JANE ROBINSON."

Winifred died in November, 1831. The signatures Mary Robinson, Jane Robinson, were apparently in the same handwriting, and it was said it was the handwriting of Mary; it was, however, sufficiently proved that if Mary signed for her sister, she did so with her concurrence and approval.

Peter Knight and his father were stated by the Misses Robinson to be their only relations. After the death of Winifred Robinson, no interest was ever required or paid by Peter Knight on the bond; but it remained in the hands of Mary and Jane, after the death of Winifred, till the death of Jane, and afterwards in the hands of Mary, till her death. The date of the endorsement was eleven years after the date of the bond, viz. in 1842; and as to the execution of the bond, it was proved that on the occasion of its being required and entered into, Peter Knight objected to it, and only yielded on a verbal representation that it was not intended the bond should be proceeded upon unless the Misses Robinson should come to want; they never did come to want, but all *died in easy circumstances. These are the material facts which appeared by the Master's report, and upon them he found that nothing was due upon the bond from Peter Knight to the estate of Mary Robinson; to this report the executor of Mary Robinson excepted.

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Mr. Bacon and *Mr. Flather*, for the exceptions, contended that the endorsement was no release at law; and if there was no release at law, there could be none in equity. * * *

Mr. Willcock, (with whom was *Mr. Greene*), for Peter Knight, in support of the Master's report, [cited *Aston v. Pye* (1) :

Here there is a release in equity, which may be even without writing: *Flower v. Martin* (2), *Cross v. Sprigg* (3)].

Mr. Bacon, in reply, [distinguished *Aston v. Pye* on the ground

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(1) 5 R. R. 60 (5 Ves. 349, *notis*).

(3) 77 R. R. 236 (6 Hare, 552).

(2) 86 R. R. 33 (2 Mac. & G. 113).

MAJOR that satisfaction of a note may be much more easily presumed than
 MAJOR. release of a bond].

[170] THE VICE-CHANCELLOR :

This case involves two distinct questions: First, what is the effect of the endorsement on the bond, having the names of Mary and Jane Robinson subscribed to it, connected with the evidence relating to the endorsement? Secondly, what are the circumstances which occurred when the bond was originally given? and if the circumstances are proved, then what is the effect of them? for the case might possibly be decided on the effect of the endorsement, as to the question whether it amounted to a discharge; or it might be decided on the question, under what circumstances the bond was originally given. Now as to the effect of the endorsement on the bond, and the evidence relating to the circumstances under which it was made, certain facts are found by the Master, which I shall assume to be true, as the finding of the Master is not excepted to. Among other facts, the Master finds that Winifred Robinson and her sisters had often stated that Peter Knight and T. Knight were their only relations. To this finding there is no exception. Then there is another finding, to which there is no exception, to the effect that after the death of Winifred, Peter Knight never paid any interest on the bond. These facts I must take to be true. Then whether Jane Robinson signed the endorsement herself or not,—whether Mary Robinson wrote the name of Jane Robinson or not, either by her direction or by guiding her hand,—this fact is established, that the memorandum was put on the bond with the consent of Jane; and she afterwards told the debtor what had been done.

[*171] Under these circumstances, the question whether the *memorandum on the bond operates as a release or discharge of the bond, or as a bar to the right of the executor to recover, appears to me to be a legal question. I cannot understand how, if the memorandum is not a bar at law, it can be a bar in equity. If the memorandum had been given for valuable consideration, it might be otherwise; being voluntary on the part of Mary and Jane Robinson, no benefit passing to them, I am at a loss to understand how, if the memorandum is not a bar at law, I can say it operates as an equitable discharge. If, then, the only question were that which depends on the effect of the endorsement, I do not see how I could avoid sending that question to law. But the second question

is, whether, referring to the other matters arising at the creation of the bond, there is anything to induce me to say that, irrespectively of the question whether the indorsement operates as a release, the Court will hold it inequitable to allow the executor to recover on the bond. Now I must, for this purpose, look at the eighth exception, which goes to the finding as to the circumstances which took place at the time of the creation of the bond. Now the Master has found the facts on the evidence of Mrs. Hart, a disinterested, respectable, and credible witness, who deposes as to what took place in her presence. [His Honour then stated the material facts found by the Master's report, as hereinbefore set forth, and proceeded as follows:] Now, in this view of the case, I am not called on to decide whether the endorsement amounted to a release or discharge of the bond, but only to decide this question, whether by the *effect of the circumstances attending the giving of the bond, there is an equity. Part, a large part indeed, of the money for which it was given was not due from Knight personally, but only in respect of the assets of his father; he and his father were near relations of these ladies, the parties to whom the money was to go; no interest was, it seems, ever demanded or ever paid; and after eleven years from the creation of the bond, this memorandum was indorsed on it by one of the surviving sisters, with, at least, the consent of the other. It appears to me that I have here not a legal but an equitable case; and the question is, whether, consistently with the authority of the case before the Lord Chancellor, and with *Cross v. Sprigg*, I can determine that if an action were brought against the bond debtor by the executor of Mary Robinson, I ought if a bill were filed to restrain that action, to grant an injunction. If I ought not to restrain that action, I ought not now to make any declaration, but to direct an action. But, as I am of opinion that if such an action were brought, I ought to grant an injunction, I am justified in coming to the conclusion that the Master is right, and that nothing is now due on the bond.

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HARRIS v. POYNER.

(1 Drewry, 174—183; S. C. 21 L. J. Ch. 915.)

A testator gave all his residuary real estate and his stock, mortgages, and securities for money, and all other his personal estate and effects to his wife and his son, upon trust for his wife for life, subject to an annuity for his son; and after her death, as to all the devised and bequeathed freehold

1852.
July 31.

KINDERSLEY,
V.-C.

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and residuary real and personal estate, of which his wife was to have the yearly interest, upon trust for his son absolutely. The testator left leaseholds, as to which at the time of his death he was liable to the landlord for repairs, and they were afterwards repaired at the widow's expense:

Held, first, that the widow was entitled to enjoy the leaseholds in specie during her life (1).

Secondly, that the repairs were to be borne by the residue, and not by the tenant for life (2).

THIS was a suit for the administration of the estate of William Poyner. The plaintiff, A. F. Harris, was the representative of the testator's son; the defendants were Sarah Poyner, the testator's widow; and Charles Harris, the husband of the plaintiff. William Poyner, the testator, after giving by his will certain specific chattels [and an annuity of 100*l.* a year to his son] proceeded thus: And as to all that my freehold messuages or tenements, and premises, with the appurtenants, and situated in Buckingham Street, in the Strand, in the county of Middlesex. And as to all other my real estate, whatsoever and wheresoever; and likewise as to all my stock in the public funds of this kingdom; mortgages and securities for money, and all other my personal estate and effects, whatsoever and wheresoever, not hereinbefore by me disposed of, or wherein the whole and absolute interest is or are not hereinbefore by me disposed of, I give, devise, and bequeath the same and every part thereof, and all my estate, term, and interest therein, with their respective appurtenants, unto and to the use of my said dear wife the said Sarah Poyner, and my said only son the said William S. Poyner, my executrix and executor herein named and appointed, their heirs, executors, administrators, and assigns, according to the

[*175] respective natures, tenures, *and qualities thereof, upon the trusts following; that is to say, upon trust during the natural life of my said wife and her remaining my widow, to pay to or permit and suffer her to receive and take the net or clear rents, issues and profits, dividends and annual proceedings, and income of all my said devised freehold and residuary real and personal estate, as aforesaid, after paying all outgoing and expenses, and the aforesaid annuity or yearly sum of 100*l.* to my said son, by equal quarterly payments as aforesaid, for her absolute use; and in case my said wife shall, after my decease, marry again, then upon trust, during

(1) *Macdonald v. Irvine* (1878) 8 Ch. D. at p. 122, 47 L. J. Ch. 494, 38 L. T. 155; *In re Game* [1897] 1 Ch. 881, 66 L. J. Ch. 505, 76 L. T. 450.

(2) See *In re Courtier* (1886) 34

Ch. D. 136, 56 L. J. Ch. 350, 55 L. T. 574; and several other cases on this point mentioned in a note to *Hickling v. Boyer*, 87 R. R. at p. 231.—O. A. S.

the remainder of her natural life, to receive and pay the said net or clear rents and profits, interest, dividends, and annual proceeds and income of all my said devised, freehold and residuary, real and personal estate as aforesaid, after paying all outgoings and expenses, and the aforesaid annuity or yearly sum of 100*l.* to my said son as aforesaid, into the proper hands of my said wife for her separate use, independent of any husband with whom she may intermarry, and who shall not intermeddle therewith; neither shall the same or any part thereof be subject or liable to his power, control, debts, or incumbrances, nor to any mortgage, sale, assignment, or other incumbrances thereof, of or by my said wife signed. I direct and declare the receipt and receipts of my said wife, signed with her own hand, in the event of, and after such her second marriage, and notwithstanding any coverture, shall at all times be good and sufficient discharge for such rents and profits, interest and dividends, and annual produce and income, as in and by such receipt and receipts shall be acknowledged and expressed to be received; and from and after the decease of my said wife, then as to all my said devised and bequeathed freehold and residuary, real and personal estate as aforesaid, with their *respective appurtenances, and of which my said wife is to have the clear yearly income for her life (subject as aforesaid), upon trust for, and I do give, devise, and bequeath the same and every part thereof, and all my estate, term, and interest therein, with their appurtenances, unto and to the use of my said only son, the said William S. Poyner, his heirs, executors, administrators, and assigns, for his and their absolute use and benefit for ever. And I direct that the same may be conveyed, assigned, and paid to him and them accordingly. And I do hereby nominate, constitute, and appoint my said wife, so long as she remains and continues my widow and unmarried, but not longer, and my said son, William S. Poyner, executrix and executor of this my will.

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The testator died in April, 1843. The widow and the son both proved the will. Part of the residuary estate of which the testator died possessed was leasehold; at the time of his death the greater part of this was in a bad state of repair; and it appeared by the Master's report, that at that period it would have cost 900*l.* to put the leasehold premises in repair. Four years after the testator's death, the landlord required the premises to be put in a state of repair, and the widow and the son caused repairs to be executed, and the expense was paid by the widow by instalments, she receiving

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the income of the testator's estate, and thereout paying these instalments, the debts, funeral and testamentary expenses, and the annuity to the son.

The son died in June, 1848, leaving the plaintiff his widow, to whom he devised and bequeathed his real and personal estate, appointing her his executrix, and she afterwards, in August, 1849, married the defendant Charles Harris.

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The cause came on now on further directions, and two questions were made: 1st, whether the leaseholds ought to be converted; 2ndly, whether the expense of the repairs was to be borne by the widow, or whether it was to be borne by the residuary personal estate of the testator.

Mr. Baily and *Mr. Rawlinson*, for the plaintiff:

On the 1st point, the widow of the testator does not take the leaseholds in specie, but subject to the usual rule of conversion; that is clearly the general rule, and there is nothing in the will to vary it. The testator does not specifically refer to his leaseholds; he only specifically mentions his real estate, stock, and mortgages; it is not necessary there should be an actual direction to convert.

2ndly, on the question of the repairs, assuming that the tenant for life is entitled to enjoy the leaseholds in specie, the defendant, to maintain her contention, must say that a tenant for life has a right to call on the remainderman to put leasehold premises in repair. There is no authority for that. *Hickling v. Bowyer* (1) decides the contrary; that a person taking a specific gift of leaseholds must repair. [They cited also *Marsh v. Wells* (2).]

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Mr. Walford, for C. Harris, the husband of the plaintiff, argued in the same interest.

Mr. Bacon and *Mr. Baggallay*, for the widow, the defendant, cited, on the question of conversion, *Blount v. Hipkins* (3), *Pickering v. Pickering* (4).

Mr. Baily, in reply.

THE VICE-CHANCELLOR:

The first question is, whether, according to the terms of the bequest of this residuary property, that portion of it which consists of leasehold estates ought, as between the tenant for life and the

(1) 87 R. R. 231 (3 Mac. & G. 635).

(2) 25 R. R. 160 (2 Sim. & St. 87).

(3) 40 R. R. 74 (7 Sim. 43).

(4) 48 R. R. 104 (4 My. & Cr. 289).

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reversioner, to be converted and invested in investments of a permanent character. (His Honour stated the portion of the will set out in pp. 630—631, and proceeded :) So far it is a devise and bequest of all the testator's real estate and all his residuary personal estate, to the wife and son, upon certain trusts. It specifies a particular freehold estate, and it specifies stock in the public funds, mortgages, and securities for money, but does not specify any other portion of the real estate. It does not specify leaseholds ; but it is a bequest to the trustees of this property, and all the testator's estate, term, and interest therein ; and it is bequeathed to the two trustees, according to the respective natures, tenures, and qualities thereof. Then the question is, What are the trusts declared, and of what property ? The trusts are in these terms : " Upon trust during the natural life of my said wife, and her remaining my widow, to pay to or permit and suffer her to receive and take the net or clear rents, issues, and profits, interest, dividends, and annual proceeds and income of *all my said devised freehold and residuary personal estate as aforesaid." Although this is not conclusive, up to this point, instead of any indication of an intention that the property should be converted, it appears to me that the testator meant that the wife was to have the income of that identical real and personal estate, which he had thus devised and bequeathed. Of course, it is " paying all outgoings and expenses, and the aforesaid income or yearly sum of 100*l.* to the son by equal quarterly payments as aforesaid." This is for the wife's absolute use. Now, though there is mention of rents there, I agree with the argument that the word " rents " may apply to the real estate ; it is not necessary to refer that to the rents of the leasehold estate ; still, although up to this point I do not think that what has been said by the testator is quite conclusive upon the point, I think the indication is in favour of an intention not to convert, rather than of an intention to convert. Then the will goes on thus : " And in case my said wife shall, after my decease, marry again, then upon trust during the remainder of her natural life, to receive and pay the said net or clear rents and profits, interest, dividends, and annual proceeds and income of all my said devised freehold and residuary real and personal estate as aforesaid, after paying all outgoings and expenses, and the aforesaid annuity or yearly sum of 100*l.* to my said son as aforesaid, into the proper hands of my said wife, for her separate use ; " and the usual direction that the receipt of the wife should be a good discharge during coverture. That is in fact merely

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continuing to the wife, in case she marries again, the same life interest, but for her separate use, to protect her against the control of any husband she might marry; and then comes this limitation: "And from and after the decease of my said wife, then, as to all my said devised and bequeathed freehold and residuary *real and personal estate as aforesaid, with their respective appurtenances, and of which my said wife is to have the clear yearly income for her life, subject as aforesaid, I do give, devise, and bequeath the same and every part thereof." Now observe the following words: "and all my estate, term, and interest therein, with the appurtenances, unto and to the use of my said only son, the said William Stapleton Poyner, his heirs, executors, administrators, and assigns, for his and their own absolute use and benefit for ever; and I direct that the same may be conveyed, assigned, and paid to him and them accordingly." And then he nominates his wife, during her widowhood, and the son, to be the executrix and executor. Now it appears to me clear, that what the testator considered he was giving to his son upon the wife's death, was the identical property which he had before bequeathed to the trustees upon the trusts; and he repeats the expression, "all my estate, term, and interest therein." Whatever, then, was the testator's estate, term, or interest in any portion of the property which he was devising to the trustees, that same estate, term, or interest he meant the remainderman to take, and that same estate, term, or interest was that of which the income was to be enjoyed by the widow for her life. It appears to me then clear, that the testator meant no conversion of the property; he meant the property, for such estate, term, or interest as he had in it when he should die, to be enjoyed in specie, first by his wife, and then enjoyed in specie by the son after her death. It is true that what the son would enjoy would be less in value than it would be at the time of the testator's death, because a part of that would be wearing out; but still, what he appears to me to have meant, judging from the terms he has used, was, that the property was to continue in specie until after the death of the wife, in *order that in specie it might go to the son. I am of opinion, therefore, that there was no intention to convert the property; on the contrary, that there was an intention that the property should be enjoyed in specie.

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Now it has been justly observed, that the direction that the property should be enjoyed in specie does not necessarily make any particular portion of the property a specific legacy, in the

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ordinary sense of a specific legacy ; it is still part of the residue ; it is a residuary gift, with a direction that the residue shall not be converted. That is the effect of it.

Next, how does this affect the other question ? which is this : The testator, at the time when he died, having been in the possession, or the holder of this leasehold property, had, in violation of the covenants in the leases under which he held, suffered the property to fall into dilapidation ; and it appears by the Master's report, that the amount of the dilapidation which had occurred at the time when the testator died was 900*l*. He had violated his covenants ; and I must assume that the testator would have been liable to the landlord in an action for damages for breach of covenant. Shortly after the testator's death, the landlord seems to have made application to the widow, and to have given formal notices to her, and to have called upon the parties to make good the dilapidations ; upon which the widow and the son together took measures, the effect of which is that the widow, as I understand, paid the amount of the dilapidations, not all in one sum, but paid them by degrees, so as to satisfy the landlord's demand. Then comes the question, Is the widow to bear that expense out of her own pocket, or is it to be borne by the testator's residuary estate ? Now the cases which have been cited, I *confess do not appear to me to govern the present case. Whether in the case of a dry specific legacy of a separate leasehold, where the testator was liable for dilapidations at the time of his death,—whether as between that specific legatee, and the person entitled to the general residue of the personal estate, the specific legatee should discharge that amount of dilapidation out of the general estate, or not,—the principle of such a case does not appear to me to govern the present case at all. In the case before Lord Truro, *Hickling v. Bouyer*, his Lordship decided against the specific legatee, principally upon the terms used in the will, though he certainly goes on to say that, irrespective of those terms, and upon general principle, he should still have decided the same way ; and I must assume that to be right. But, assuming it to be right (although I confess, if it had been *res integra*, I should have questioned it very much,—not upon the terms of the will in that case, but upon the general principle), that was a question as between the specific legatee of a separate leasehold, and the residuary legatee of general personal estate. Here it is a question as between the tenant for life and the remainderman or the reversioner, of an aggregate mass of

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property, all constituting the residuary real and personal estate, of which the leaseholds in question form only a component part.

(*Mr. Baily* : The leaseholds constitute the whole of the residue.)

THE VICE-CHANCELLOR :

[*183] That may be ; it may turn out that they do so ; except that I see the testator mentions his stock in the public funds, and his mortgages and securities which he might have ; he left none, but he meant to leave some, and thought he should leave some. But, however that may be, it appears to me, *that without at all pretending to infringe upon the authority of the case before Lord Truro, whose authority, of course, I am bound to submit to, this is a case so entirely different, that very different principles are applicable to it. And it appears to me, that in this case, where there is a tenant for life and remainderman or reversioner, under the same will, of a large mass of property, consisting partly of this leasehold property, and that all this was subject, at the time when the testator died, to the payment of 900*l.* to the landlord, to make good the dilapidations incurred up to that time, that upon every general principle, the tenant for life ought not to bear that charge. In fact, if the landlord had thought fit he might have taken away the benefit of this leasehold property from both parties, by insisting upon entering for breach of the condition. But to prevent that, as well as to prevent an action for damages, the parties very wisely,—the tenant for life and the remainderman, being also the executor and executrix, arranged that the payment should be made. That payment was made, and the result or effect of that payment being made, was that the property is preserved for the benefit of those who are interested in the residue ; that is, preserved for the benefit of the tenant for life and the remainderman. It appears to me, that if there had been a fund of money or of stock, or any general fund, part of the residue, that ought to be applied in payment of this 900*l.* But whatever the residue be,—whether it be in one shape or another, whether it be large or small,—it appears to me, to the extent of the residue, it ought to go in discharge of this 900*l.*

EX PARTE THE FREEMEN AND STALLINGERS OF
SUNDERLAND (1).

EX PARTE THE BISHOP OF DURHAM.

(1 Drewry, 184—192; S. C. 16 Jur. 370.)

The 79th section of the Lands Clauses Consolidation Act, 1845, applies only to the jurisdiction of equity in ordering money to be paid out of Court, and is not material or relevant where an issue at law has been directed by the COURT for the purpose of determining the question of ownership as between adverse claimants to the land represented by the money in Court.

MR. BETHELL, Mr. Wilcock, Mr. Hugh Hill, and Mr. C. Hall were for the freemen and stallingers; and

Mr. Stuart, Mr. Faber, Mr. Atherton, and Mr. Manisty, for the Bishop.

The case was argued on the 10th and 11th February. On the 1st of March, the VICE-CHANCELLOR delivered the following written judgment (2):

THE VICE-CHANCELLOR:

These two petitions call upon the Court to determine who is entitled to the sum of 3,410*l.*, which was paid in by the York, Newcastle and Berwick Railway Company, as the purchase-money for about six acres of land, part of Sunderland Town Moor, lying in the parish of Sunderland, which six acres were taken by the Railway Company under the powers of its Act. This must, of course, depend upon the question, who was the rightful owner of the six acres of land at the time when the land was taken by the Railway Company.

The claimants are the Bishop of Durham and the Corporation of the Freemen and Stallingers of Sunderland. There is no third claimant, nor any apparent possibility of a third claimant; and therefore, to one or other, or to both of the two claimants, the sum in question must ultimately be awarded.

Both the claimants having, in the early part of last year, petitioned the Court, it seems to have been felt by the counsel on both sides, that the question as to the ownership of the six acres of land in question, was proper to be tried by an issue, to be directed to a court of law; and accordingly, without arguing the merits of the

(1) *Ex parte Chamberlain* (1880, 14 Ch. D. 323, 49 L. J. Ch. 354, 42 L. T. 358.

(2) The reporter was not present

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during the arguments; the facts, however, and the material arguments, are noticed in the judgment.

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question before this Court, and adducing evidence in support of the respective claims, an issue was arranged by the parties or their counsel, and an order was made by Lord CRANWORTH, dated the 28th March, 1851, in these terms: "The freemen and stallingers were to affirm, and the Bishop to deny, that the six acres or thereabouts, part of the tract of land called Sunderland Town Moor, taken by the Railway Company for the purposes of their undertaking, were, and that every part thereof was, on the 1st February, 1849, the soil and freehold of the said freemen and stallingers, and that the same were not, nor was any part thereof, on the day and year last aforesaid, the soil and freehold of the said Lord Bishop of Durham; and the freemen and stallingers affirm that some part, and the Lord Bishop denied that any part, of the premises were on the said day the soil and freehold of the freemen and stallingers; the Court being desirous to ascertain by the verdict of the jury, whether or not the whole of the hereditaments or any part was or were, on the said 1st day of February, 1849, the soil and freehold of the freemen and stallingers." By this form of issue, the corporation was made the plaintiff-at-law.

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The issue was accordingly tried at Durham on the 31st July, 1851, before Mr. J. Vaughan Williams and a special jury.

The case set up by the corporation was, that the freemen and stallingers were a corporation by prescription, and that as a corporation they had been, from before the time of legal memory, owners of the soil and freehold of the whole of the tract of land called the Sunderland Town Moor, including the six acres in question.

The case set up by the Bishop of Durham was, that he, in right of his see of Durham, was the lord of the manor of Houghton-le-Spring; that the tract of land called Sunderland Town Moor (including the six acres in question) was part of the waste of that manor; and that therefore the soil and freehold of the manor were vested in him as lord of the manor; and at the same time he admitted that the corporation was entitled to the herbage or vesture or pasturage of the moor, though not to the soil and freehold.

Much evidence (chiefly documentary) was adduced on both sides in support of the respective claims.

The learned Judge, in summing up the case to the jury, went with the utmost care and pains through all the details of the evidence, pointing out to them minutely and clearly, and I need hardly say most impartially, all the points for their consideration on each portion of the evidence; and having done that, he concluded

his summing up thus: "Now, gentlemen, this is the evidence on the one side and the other. You will have to judge for yourselves. The question is, is the evidence *adduced on behalf of the Bishop of a nature so powerful, that, notwithstanding the long series of acts of ownership, so unequivocal, so public, and so notorious, on the part of the plaintiffs, you think the title is in the Bishop, and that those acts, notwithstanding their publicity and notoriety, were merely the acts of usurpers,—if you think so you must find for the defendant; if you think not, then you must find for the plaintiffs. If your minds are equally balanced, and you cannot make them up, inasmuch as the burden of proof is on the plaintiffs, you must find for the defendant."

The jury found a verdict for the defendant, but they delivered their verdict in these terms: "We find for the defendant in accordance with his Lordship's direction, neither party having made out their title to our satisfaction."

Each of the contending parties has now presented a further petition, insisting that the effect of the trial has been to establish the right of the petitioner.

It is contended, on the part of the corporation of freemen and stallingers, 1st, that the mere fact of the verdict being in favour of the Bishop is immaterial, and that an examination of the evidence at the trial will lead this Court to the conclusion that the right to the soil and freehold of the land in question, and not merely to the herbage or pasturage, was and is vested in the corporation; and that therefore the Court should disregard the verdict, and award the 3,410*l.* to the corporation; 2ndly, that the evidence at the trial, if it did not conclusively prove the right of the corporation to the soil and freehold of the land, at least proved that the corporation was in possession; and that, under the 79th section of the *Lands

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their title is admitted; or, at all events, were acts of usurpation and that the evidence proved the Bishop's own possession of the soil and freehold.

Upon one point in these several arguments, I entertain no doubt. I am clearly of opinion that I cannot regard this verdict, though in form a verdict for the Bishop, as expressing the opinion of the jury that the right is vested in his Lordship. The jury, in delivering their verdict, declare that neither party had made out his title to their satisfaction, and that they find for the defendant in accordance with the learned Judge's direction, which was, that if, upon considering the evidence, their minds were equally balanced, and they could not make them up, they should find for the defendant. In fact, they would equally have found for the freemen and stallingers, if they had happened to be the defendant.

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Inasmuch, then, as the verdict leaves the question entirely undecided, can the Court enter into an examination of the evidence laid before the jury, and itself decide *the case at once in favour of either of the parties upon its own view of the effect of that evidence? In my opinion it cannot. This Court uses the machinery of an issue for the purpose of ascertaining the opinion which a jury, under the direction of one of the Judges, may form with respect to the question sent for trial, and not as a mere instrument to elicit evidence upon which this Court is to pronounce its own decision on the question. This Court will, indeed, upon an application for a new trial, look into the evidence for the purpose of examining whether there has been any such miscarriage at the trial as to justify it in refusing to be bound by the verdict, and in granting a new trial, but not for the purpose of pronouncing its own decision on the case irrespective of the verdict.

On a similar ground I consider that I cannot go into the evidence before the jury, in order to try whether it is proved by that evidence that the corporation of the freemen and stallingers were in possession of the land at the time when it was taken by the Railway Company. And there is this additional reason why I ought not to go into the evidence for that purpose, viz., that no issue was directed to try the question who was in possession.

It therefore remains with me to consider whether there ought to be a new trial. It is contended, on the part of the freemen and stallingers, that there ought to be a new trial, on the ground of misdirection in the learned Judge, and it is insisted that he misdirected the jury in the following particulars: 1st, in stating to them,

that if they should be satisfied that the Bishop was at any time since the disabling statute of Elizabeth the *owner of the soil, he still continued to be so, omitting all reference to the Statute of Limitations; and 2ndly, that he did not tell the jury that by the 79th section of the Lands Clauses Consolidation Act, the freemen and stallingers being in possession as owners, ought to be deemed the owners, unless they were satisfied that the Bishop had made out his title. With respect to the first point there is no doubt that, under the 29th section of the Statute of Limitations (3 & 4 Will. IV. c. 27), if the Bishops of Durham had once been in possession of the land, and had been dispossessed, and since the time of such dispossession, a period of not less than sixty years had elapsed, comprising two incumbencies of the Bishopric, and six years of a third incumbency, the right of the Bishop would be extinguished. But it is equally clear, that if the counsel for the freemen and stallingers at the trial meant to rely on that statute as the foundation of their title, the *onus* lay upon them to show that the period of time during which the Bishops of Durham were alleged to have been out of possession, not only amounted to sixty years, but also comprised two incumbencies, and six years of a third incumbency. But so far from the counsel for the corporation having attempted to show this, their leading counsel, in his reply, declared very explicitly that he did not mean to set up a title founded on a possession during the period mentioned in the 29th section of the Statute of Limitations, but that he relied upon possession as the strongest possible evidence of title; and he referred to the Statute of Limitations only as evincing the feeling of the Legislature on that point. It does not appear to me, therefore, that there was any misdirection of the Judge in this respect. Nor do I think there was any misdirection in omitting all reference to the 79th section of the Lands Clauses Consolidation *Act; for that section appears to me to have been intended only as a direction to this Court how it should act in any case in which, upon an application for the money paid in or deposited by the Railway Company, it should be unable to arrive at a satisfactory conclusion as to what party was lawfully entitled to the land; and I think that, upon an issue directed by this Court, for the purpose of enabling it, if possible, to arrive at a satisfactory conclusion on that point, it would have been a miscarriage to have directed the jury to have any regard to that section of the Act. Indeed, the counsel for the corporation, at the trial, seem to have been of that opinion, for they did not make the least attempt to draw

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the attention of the Judge or jury to the section of the Act in question. I am of opinion, then, that there was no misdirection in the learned Judge's summing up to the jury, and I cannot say that the verdict was against evidence, for I must consider that in effect there was no verdict at all deciding the question of right in favour of either party.

But though I cannot concur in the reasons upon which it is contended that there ought to be a new trial, of the issue, yet I am satisfied that I have no alternative but to send the case again to a court of law on this simple ground, that the trial which has been had, has not been attended with any such result as this Court can act upon. I do not, however, think that I ought simply to send the same issue to be tried again. The course which appears to me to be the best calculated to produce such a result as would enable this Court to dispose of the money is this: to direct two issues, the one to try the right, and the other to try the fact of possession. In the first issue I shall make the Bishop of Durham the *plaintiff; that is, he shall affirm, and the corporation shall deny, that the land in question was, on the 1st February, 1849, the soil and freehold of the Bishop of Durham. And in the second issue I shall make the corporation of the freemen and stallingers the plaintiffs; that is, the corporation shall affirm, and the Bishop shall deny, that on the 1st February, 1849, the corporation was in possession of the soil and freehold of the land, as being the owners thereof, or in receipt of the rents of such soil and freehold, as being entitled thereto.

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WALDRON v. SLOPER (1).

(1 Drewry, 193—201.)

Sloper, in 1833, mortgaged certain real estate to Sievewright, with a power of sale, under which the property was sold in 1842, to a purchaser who transferred his contract to Sievewright. There was a balance after paying off Sievewright, and there being accounts between Sloper and Matthews, who had taken a mortgage of Sloper's equity of redemption in 1834, this balance was placed, under a deed of 25th June, 1842, in the hands of trustees to be dealt with by arbitration between Sloper and Matthews.

In January, 1840, Matthews had deposited his security with Waldron, the plaintiff, by way of equitable mortgage.

In April, 1842, Matthews applied to the plaintiff for the loan of the

(1) Distinguished *In re Vernon, Ewens & Co.* (1886) 33 Ch. Div. 402, 56 L. J. Ch. 12, 55 L. T. 416; *Taylor v. Russell* [1891] 1 Ch. 8, 60 L. J. Ch. 1; aff. [1892] A. C. 244, 61 L. J. Ch. 657; *Taylor v. London and*

County Banking Co. [1901] 2 Ch. 231, 70 L. J. Ch. 477, 84 L. T. 397, 49 W. R. 451; *Walker v. Linom* [1907] 2 Ch. 104, 76 L. J. Ch. 500, 97 L. T. 92.

deposited deed, telling him that the property was sold and that the deed was wanted to enable the purchase to be completed, and promising to return the deed forthwith. He did not return the deed, and the plaintiff did not apply to have the deed back for more than four years. In May, 1843, Matthews deposited the deed, by way of mortgage, with Pinckney, who now held it.

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In 1846, Matthews became bankrupt. Waldron filed his claim to be treated as first incumbrancer, and to have the balance in the hands of the trustees of the deed of 1842 paid to him :

Held that, as between Waldron, the plaintiff, and Pinckney, the plaintiff had, by his *laches*, enabled Matthews to commit a fraud on the defendant Pinckney, and had no equity against Pinckney.

THIS was a claim to have the sum of 766*l.* 2*s.* 5*d.*, formerly in the hands of the trustees of a certain deed, dated the 25th of June, 1842, and afterwards paid into Court, paid to the plaintiff, as prior equitable mortgagee of one Matthews.

In May, 1833, Sloper mortgaged certain real estate, by a deed of that date, to Sievwright, to secure 2,500*l.*, *and, by a subsequent deed of 1834, a further sum of 1,200*l.* was secured. The mortgage deed contained a power of sale, under which the mortgaged property was sold by auction on the 7th of June, 1842, to one Peto. By the deed of the 25th of June, 1842, reciting the deeds of 1833 and 1834, and that Peto had agreed to transfer his contract for the purchase to Sievwright, and Sievwright had agreed to adopt it, the property was conveyed to Sievwright for 3,500*l.*; and there being on this a balance of 766*l.* 2*s.* 5*d.*, after settling the mortgage account between Sloper and Sievwright, that sum was placed in the hands of Messrs. Maynard and Bishop, parties to the deed, in trust for Sloper and Matthews, between whom there was then an account, to be dealt with according to the determination of an arbitrator, to whom they had agreed to refer their differences. In August, 1834, Sloper by deed mortgaged the equity of redemption to Matthews to secure 100*l.* In January, 1840, Matthews deposited his mortgage deed with the plaintiff Waldron, by way of equitable mortgage, and signed a memorandum, by which he bound himself to execute a complete mortgage. In April, 1842, Matthews wrote to the plaintiff, telling him the mortgaged property was sold, and asking him to lend him the deed held by the plaintiff, to enable him, Matthews, to produce it, as it would be requisite for completing the purchase, and he promised to return it forthwith. He did not return it, nor was he called upon to do so by the plaintiff; and in May, 1843, Matthews, being indebted to Pinckney, deposited with him this deed. In 1846, Matthews became bankrupt, and in the mean time, as stated, viz. in June, 1842, the mortgaged property

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was sold, and the balance to which Matthews had a claim was paid into the hands of trustees, and afterwards paid into Court.

In this state of things, Waldron filed his claim against Sloper the original mortgagor, Pinckney the mortgagee by deposit of the 15th of May, 1843, the assignees in bankruptcy of Matthews, and Maynard and Bishop the trustees of the deed of the 25th June (1), 1842, to have the balance of 766*l.* 2*s.* 5*d.* in Court paid to him as first incumbrancer. Pinckney resisted the claim on the ground, among others, that a fraud had been committed on him, which postponed the plaintiff to him. The assignees of Matthews resisted the claim, on the ground that the property had been converted into personalty long before the bankruptcy; that the rule of order and disposition applied, and that the money belonged to the assignees of Matthews.

Mr. Rogers, for the plaintiff:

The plaintiff was clearly the first equitable incumbrancer; his mortgagor borrowed the deed from him for an apparently reasonable purpose, and there was nothing to put the plaintiff upon suspecting fraud. That Matthews had committed a fraud upon Pinckney could not postpone the plaintiff, who was no party to it. Besides, the deposit of the deed, which is a chattel real, vested the legal title to the deed in Waldron, and that could not be taken from him by a subsequent deposit by Matthews, of the deed which was no longer his: *Wiltshire v. Rabbits* (2). As to the property being in the order and disposition of the bankrupt, that doctrine does not apply: *Jones v. Gibbons* (3). To constitute order and disposition it must be with the knowledge and consent of the party to be deprived of his claim. Here there *was no consent; for the deed being lent for a particular purpose, and dealt with for another, that was a fraud, and such a parting with the property did not amount to consent within the authorities.

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Mr. James T. Wood, for Maynard and Bishop, the trustees of the 766*l.* 2*s.* 5*d.*

Mr. Stuart and *Mr. Shapter*, for Pinckney:

The deposit by Matthews of the deed with Pinckney & Co., to secure their debt, makes Pinckney an equitable mortgagee without notice; the plaintiff, by giving possession of the deed to Matthews,

(1) "January" in the original report by a manifest error.

(2) 65 R. R. 345 (14 Sim. 76).

(3) 7 R. R. 247 (9 Ves. 407).

in the way he did, enabled him to commit a fraud, and he thereby lost his priority, even if the mortgaged property were real estate: *Bowen v. Evans* (1), *Head v. Egerton* (2), *Kennedy v. Green* (3). But the mortgaged property was personal estate at the time Pinckney took a deposit of the deeds. The estate mortgaged to Sievwright was converted into money by the sale, and therefore it was no longer a question of equitable mortgage, and priority of deposit had no application as affecting priority of estate. That Waldron had notice of the conversion is plain; the application to him for a loan of the deed told him that the estate was sold. The sale was in January, 1842, the deposit with Pinckney in April, so that at the time the plaintiff's security was merely a personal chose in action.

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There was great delay on the part of the plaintiff in making any attempt to get the deed back, and that delay will render him liable to be postponed: *Peter v. *Russel* (4), *Evans v. Bicknell* (5), *Worthington v. Morgan* (6), *Whitbread v. Jordan* (7), *Swayne v. Swayne* (8).

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Mr. Giffard, for the assignees of Matthews :

At the date of the bankruptcy the deed of mortgage to Matthews was of no value; the subject-matter of it had ceased to be realty: the money was in the hands of trustees for the plaintiff, and was therefore in his order and disposition, and passed to his assignees. *Ex parte Mackay*, and the like, are cases where, at the date of the bankruptcy, the property was real estate. The claim of the plaintiff cannot therefore be sustained.

THE VICE-CHANCELLOR :

In this case a fraud has, undoubtedly, been committed by Matthews against two persons, and one of them must suffer; the first question is between the plaintiff and Pinckney; the second is between the plaintiff and the assignees of Matthews. Each of these questions arises on this claim, and must be considered. The material circumstances are these: Sloper, being the owner of certain real estate, mortgaged it to Sievwright with a power of sale which he might exercise without the consent of the mortgagor, or of any body claiming under him. Afterwards he mortgaged it to Matthews, by the deed of August, 1834, by which he mortgaged the equity of redemption to Matthews in fee for 100*l.*; the rights

(1) 1 Jo. & Lat. 178.

(2) 3 P. Wms. 280.

(3) 41 R. R. 176 (3 My. & K. 699).

(4) 2 Vern. 726.

(5) 5 R. R. 245 (6 Ves. 174).

(6) 80 R. R. 142 (16 Sim. 547).

(7) 41 R. R. 281 (1 Y. & C. 303).

(8) 83 R. R. 221 (11 Beav. 463).

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acquired by Matthews, by virtue of that deed, were not to any legal estate; he became mortgagee of an equity of redemption after a prior mortgage, subject to the rights of a prior mortgagee, who had a power by exercising his *power of sale to convert at any time the right of Matthews into a mere right to receive money; Matthews having that right, in January, 1840, deposited his deed with the plaintiff Waldron, and signed a memorandum accompanying the deposit, by which he bound himself to make a complete mortgage. The position of the plaintiff was then this. He might call on Matthews to make an actual conveyance, and then stand in the same position as Matthews, but until there was an actual conveyance, his right was to say that whatever was forthcoming to Matthews as the fruit of his mortgage, the plaintiff had a right to that, to the extent of what should be remaining due to him. So matters continued until the 1st of April, 1842, and then the plaintiff received a letter from Matthews, saying the mortgaged property was sold; he does not in that letter say that it was sold by the first mortgagee, but that might be inferred, for nobody else it appears could sell. However, he says that the property was sold, and he asks the plaintiff to lend him the deed deposited with him, in order that he, Matthews, might produce it as being requisite in completing the sale. Now this might be either a fraud at the time, or he may have originally borrowed the deed with a good intention, and afterwards detained it with a bad one. I confess I do not see why it was necessary for completing the purchase, that the deed should be produced. It is not, however, very material whether Matthews had an honest purpose or not in borrowing the deed. In fact, he did borrow it, promising to return it when he returned from London; the plaintiff lent it, and it appears to me that if the plaintiff had got back the deed on the return of Matthews, even though he might in the mean time have made an improper use of it, nobody could have acquired thereby any interest as against the plaintiff. But

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*having been told by the letter of April, 1842, that the estate was sold, he took no steps to inquire about the sale; all he did was from time to time to ask for the deed; it is not said in his affidavit when and how often, or at what periods, he did so. However, he allowed the deed to remain in the possession of Matthews, or of any other person to whom he might have pledged it, from April, 1842, to December, 1846, when the *fiat* against Matthews issued. It appears that the estate was sold in January, 1842; it was purchased by Peto. Now it is very probable that Peto was but the nominee of

Sievwright. Whether that is so or not, the sale was, or must at any rate in this suit, be taken to be valid, and it was carried into effect, and a conveyance made to Sievwright; and after paying off his mortgage, a sum of 766*l.* 2*s.* 5*d.* of the purchase-money remained, and if there had been no mortgage to Matthews this would have been paid to Sloper; but Sievwright being aware of the second mortgage to Matthews, and that to the extent to which anything on that mortgage was due to Matthews it would be payable out of the surplus, and there being questions between Sloper and Matthews as to what was due to Matthews, it was agreed that it should be placed in the hands of trustees to abide the result of an arbitration as to how much was due to Matthews, and to what extent it was held on trust to pay Matthews. Sievwright was not, apparently, aware of the deposit to the plaintiff, nor did he, it seems, know of the deposit to Pinckney. Now the plaintiff having allowed Matthews to retain the deed which he had promised to return, for four years and a half, Matthews became bankrupt in 1846, and then it came out that one year after he had got the deed he had deposited it with Pinckney for securing an advance, and the plaintiff now comes for the assistance of a court of equity against *Pinckney, he asks for payment of the money to him in preference to Pinckney.

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I will take this part of the case first. Now it is an elementary principle that a party coming into equity in such a case is bound to show that he has not been guilty of such a degree of neglect as to enable another party so to deal with that which was the plaintiff's right, as to induce an innocent party to assume that he was dealing with his own. If, here, ordinary diligence had been used by the plaintiff, if instead of resting satisfied with the excuses of Matthews, he had insisted on the deed being returned, not in one or two months, but even in nine or twelve months, even then in the events that have happened Matthews could not have committed the fraud. But Matthews having committed the fraud in May, 1843, in consequence of the neglect of the plaintiff from then to December, 1846, Pinckney was induced to go on making advances to Matthews on the faith of his possession of the deed. If ever there was a case in which, as between two innocent parties, that one must suffer who has permitted the fraud to be committed, it is this case, and I am of opinion that the plaintiff, who, by his great neglect put it in the power of Matthews to commit the fraud, has no right to come and ask equity to interfere.

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Next, as to the question between the plaintiff and the assignees of Matthews. At the time the plaintiff received the memorandum accompanying the deposit by Matthews, the plaintiff acquired an interest in real estate, not as owner, nor perhaps strictly as mortgagee, but a right of this sort, that whatever Matthews could work out by virtue of his estate, the plaintiff should have a right to stand in his place. Now Matthews's interest was an interest *in real estate convertible at any time into money, and that conversion is what actually happened; for in June, 1842, the right of Matthews, under his mortgage, became a mere right to recover money placed in the hands of trustees. At the time then of the bankruptcy, whether the right was in Matthews or in the plaintiff, or in Pinckney, or in the assignees of Matthews, it was a right to receive a sum of money. The deed then had ceased to be of any value as a deed affecting real estate. It may be that, under certain circumstances, the person holding that deed might have had by reason of it a claim to be paid the surplus money. But as no notice was in fact given by the holder of the deed, or by the plaintiff, either to the first mortgagee or to the trustees of the deed of the 25th June, 1842, the effect is that Matthews had a right to require payment to him, and that the rule as to order and disposition does apply. The possession of the deed gave, I think, no right to Pinckney, unless he had given notice of his claim, the prior right to receive the money being in the assignees. It is unnecessary, however, upon this record, to decide that point, and the order will be simply to dismiss the claim with costs, and the money must be paid back to the trustees.

1852.
July 2.

EX PARTE PUGH, IN RE THE TRUSTS OF WAITE'S WILL.

(1 Drewry, 202—204; S. C. 16 Jur. 652.)

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Under the old law of husband and wife, where the husband had become bankrupt and the wife had no other sufficient provision, her equity to a settlement out of a sum of 681*l.* was not limited to a moiety, but was intended to cover 400*l.* as against the creditor's assignee.

THIS was a petition by the surviving assignee of Mr. Carttar, (under a deed of assignment for the benefit of his creditors,) seeking that a sum of 681*l.* Reduced Bank Annuities, to which Mrs. Carttar was entitled under the will of Mr. Waite, and which had been transferred into Court under the 'Trustees' Relief Act, might be paid to petitioner, subject to the costs and to Mrs. Carttar's equity for a settlement.

Mr. Carttar had, after the assignment, become a bankrupt.

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Mr. Teed and *Mr. Simpson*, for the petition. * * *

Mr. J. Hinde Palmer, for the wife, cited *Re Cutler* (1). * * *

Mr. Teed, in reply. * * *

Mr. Brett appeared for the assignees in bankruptcy of *Mr. Carttar*. [203]

THE VICE-CHANCELLOR:

If it is too much to say that it is a positive rule, certainly it is at least the practice to give half of the fund to the husband or his assignees. In *Napier v. Napier* (2), the view taken by the LORD CHANCELLOR was, that, in the absence of special cases, half the fund should go to the wife and children, and the other half to the husband; but that, if there were special circumstances, a larger share might be given to the wife.

Is there then here any circumstance sufficient to occasion a departure from the usual rule or practice? I think that here it is a circumstance to be looked at, that this lady being, at the time of her marriage, and for a long time afterwards, in a position of respectability, and indeed of affluence, is now reduced by her husband's embarrassments; that may properly be taken into consideration, and I think that the right course to be taken will be this, that the assignees and the petitioner should have their costs paid out of the fund, and then I think it will not be going beyond the practice to settle 400*l.* of the stock, and to let the petitioner have the remainder; that will be giving them much less than half, but I think the circumstances are sufficient to justify it. *Mrs. Carttar's* costs will of course be paid by herself. The order will *be that 400*l.* of the fund in Court shall be carried to the separate account of the wife and children, and the settlement will be embodied in the order, which will direct the dividends to be paid to the wife during her life, after her death to such of her children as, being sons, shall attain twenty-one, or, being daughters, shall attain twenty-one or be married, with liberty to apply after the death of the wife; the balance of the fund to be paid out to the petitioner.

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(1) 92 R. R. 80 (14 Beav. 220).

(2) 1 Dr. & War. 407.

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March 25.
June 25.

EX PARTE ROBERTS.
IN RE THE WOLVERHAMPTON, CHESTER, AND
BIRKENHEAD JUNCTION RAILWAY COMPANY.

(1 Drewry, 204—215.)

[Obsolete law as to the liability of a member of a provisional committee of a projected Company, who had applied for 100 shares in the Company and had been requested to take 25 shares, but had taken no notice of the communication until after the abandonment of the scheme. See the note on *Hutton v. Upfill*, 81 R. R. p. 346.—O. A. S.]

1852.
March 11.

FORD v. DOLPHIN.

(1 Drewry, 222—225.)

KINDERSLEY,
V.-C.
[222]

A trustee cannot generally be ordered to produce documents relating to the trust in the absence of his *cestuis que trust*.

THIS was a motion for the production of documents in the hands of Leman, one of the defendants, as trustee of a deed, the impeachment of which by the plaintiff, a creditor of the defendant Dolphin, was the object of the bill. The deed was a deed of family arrangement, made by Dolphin, by which he settled his property on his wife; Leman was a trustee of this deed, and admitted that he had in his possession a bill of costs of Dolphin's solicitor against him for the preparation of the deed, and other documents, all of which he alleged he held as trustee of the deed.

Mr. Rogers, for the plaintiff, moved for the production of the bill of costs and the other documents, admitted by Leman to be in his possession.

Mr. Follett and *Mr. Busk* objected that all the *cestuis que trust* of Mr. Leman were not parties, and that to take documents out of the hands of a trustee you must have all the *cestuis que trust* before the Court. The bill showed, that the deed which it sought to set aside contained a power of appointment to Mrs. Dolphin, and she had exercised that power to create an incumbrance in favour of two persons named Stubban and Jocelyn, and they were not before the Court.

Mr. Rogers said, the bill admitted the validity of the charge in favour of Stubban and Jocelyn, and did not seek to disturb it, and was only to set aside the deed as against Mrs. Dolphin, subject to the rights of her mortgagees. *He undertook, on behalf of the

plaintiff, to admit, at the Bar, the validity of the mortgages to Stubban and Jocelyn.

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DOLPHIN.

Mr. Stuart and Mr. Robson appeared for Mrs. Dolphin.

Mr. Toller, for Mr. Dolphin.

Mr. Malins and Mr. Selwyn, for other parties.

Mr. Follett :

The objection is not removed by that undertaking. The trustee of the deed is asked to produce documents which are the property of all his *cestuis que trust*; he cannot do that, unless they are present to consent. The plaintiff's undertaking would protect the mortgagees, as between them and the plaintiff; but the production of their documents may damnify them as between them and other persons; and therefore their trustee ought not to be called upon to produce them in their absence.

THE VICE-CHANCELLOR :

As to the documents which the defendant Leman says are in his possession as a trustee under the deed, as a general proposition you cannot move against a trustee to produce documents of such a character, in the absence of his *cestuis que trust*. That is quite clear as a general rule.

This motion was before me on a former occasion, only addressed to Mr. Leman, and I then thought that I could not make the order without having his *cestuis que trust* before me.

If that is the right principle it must be carried out fairly, that is, to its reasonable consequences. Now it appears that in the execution of a power under the deed, Mrs. Dolphin has appointed some portion of the estate comprised in it to two gentlemen—Mr. Stubban and Mr. Jocelyn—by way of security to them for monies advanced by them. They are not parties to this suit. Now, *primâ facie*, the same principle applies to them as to the other *cestuis que trust*, although they are only *cestuis que trust* of a small portion. That, on principle, can make no difference; and *primâ facie* I could not make the order in their absence.

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But then it is said, this bill was not intended to impeach the securities of Messrs. Stubban and Jocelyn. But on that ground I think the language of the bill is so ambiguous that I cannot say that their interest is secure against an attack, even in this suit; and therefore I suggested the undertaking which was given by Mr.

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Rogers, not to impeach these securities. That undertaking might protect these gentlemen, if Ford was the only person who could impeach their securities. But this bill is not filed in the ordinary form; it prays that it may be taken, if requisite, as a bill on behalf of creditors generally. What that means specifically I cannot exactly see. But this, at all events, I know: this is a suit to impeach a deed as fraudulent against creditors generally, as well as against Ford; any undertaking of Ford cannot protect the mortgagees against the claims of the other creditors, who might avail themselves of the discovery obtained to impeach their title.

[*225]

I think the general principle must prevail. It is said these documents ought not to be considered as in the possession of the defendant Leman, as trustee; and, as *to the bill of costs, it is asked how that can be in his possession as trustee? I think the bill of costs may be most material in impeaching the securities; and if the production of any documents in Leman's possession as trustee might assist the plaintiff in impeaching the deed, it follows that it is possible that such document may be material to support the derivative deeds. At all events, when Leman has sworn that all the documents are in his possession as trustee, and there is no suggestion that he has any other character, I cannot distinguish the bill of costs from any other of the documents. Those documents, therefore, which Leman, by his answer, says are in his possession as trustee, cannot be produced, and the motion must be refused.

1852
Nov. 4.

MILDMAY v. METHUEN.

(1 Drewry, 216—221; S. C. 22 L. J. Ch. 297; 16 Jur. 965.)

The 42nd section of the Masters in Chancery Abolition Act (15 & 16 Vict. c. 80) did not authorize the Court to delegate to the Master the power of calling in scientific aid.

[See now Ord. LV. r. 19, which is substituted for this statutory provision.]

1852,
Nov. 12.
KINDERSLEY,
V.-C.
[225]

RAWLINS v. M'MAHON (1).

(1 Drewry, 225.)

The 44th section of 15 & 16 Vict. c. 86, did not apply to paying money out of Court.

A PETITION was presented to have a small sum of money (28*l.*) paid under the 44th section of the 15 & 16 Vict. c. 86, to

(1) See now Ord. XVI. r. 46, which is substituted for this statutory provision.

certain persons who were the solicitors of a deceased party to the suit, in order to avoid the expense of taking out representation. The Court thought the clause did not apply to paying money out of Court, and declined to make the order.

RAWLINS
v.
M'MAHON.

EX PARTE BEARDSHAW.
IN RE DOVER AND DEAL RAILWAY COMPANY.

(1 Drewry, 226—233.)

1852.
Nov. 12.

A subscriber for shares in a projected Railway Company which proved abortive is not liable as a contributory to the expenses of attempting to form the Company.

[See the note on *Bright v. Hutton*, 88 R. R. p. 127.]

BARTLEY v. BARTLEY (1).

(1 Drewry, 233—234; S. C. 16 Jur. 1062.)

1852.
Nov. 20.

A plaintiff having an order for himself, his solicitors, and agents, to inspect a defendant's documents, will not be permitted to take with him another defendant to assist him in inspecting the documents.

KINDERSLEY,
V.-C.
[233]

By an order of May, 1852, plaintiffs, their solicitors and agents, were to be at liberty to inspect and peruse, at the house of one of the defendants, G. W. Bartley, and to take copies and abstracts of, or extracts from certain documents in his possession. A motion was now made that these documents might be produced and left with the clerk of records and writs.

Mr. K. Parker, for the motion.

Mr. Hinde Palmer, for the defendant.

The material facts appear by the judgment.

THE VICE-CHANCELLOR :

The motion now made is founded on this basis : An order being made, giving to the plaintiffs, their solicitors or agents, liberty to inspect documents, the plaintiff has failed to get the benefit of that order, and it is said that the failure has arisen from the misconduct of the defendant. The plaintiff has failed, because, on going to the

(1) It is understood that this practice remains in force in the Chancery Division.—O. A. S.

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BARTLEY.

[*231]

house of G. W. Bartley, to inspect, and taking with him another person, viz. Robert Bartley, another of the defendants, the defendant, G. W. Bartley, objected to allow R. Bartley to inspect, *because he was neither the agent nor the solicitor of G. W. Bartley, and was himself a co-defendant; as such, the defendant, G. W. Bartley, insisted that the defendant, R. Bartley, had no right to inspect, and the plaintiff could not give him any. The question really comes to this: suppose the documents were deposited with the clerk of records and writs, with the usual order for the plaintiff, his solicitor or agents, to inspect; and suppose the plaintiff to go to the office to inspect, and to take with him the defendant, R. Bartley, desiring that R. Bartley should inspect the documents, and the defendant, G. W. Bartley, were to object; then, according to the practice of the writ and record clerks office, would R. Bartley be allowed to inspect or not? If the plaintiff would have a right in that office to have the assistance of R. Bartley to inspect, he must have the same right under the order of May, 1852. It must be ascertained from the proper officers, what is the practice of the office of the clerks of the records and writs. There may still be a question whether the word "agents" means any person whom the plaintiff may choose to nominate for the mere purpose of inspection.

The case stood over to ascertain the practice of the office, and on the 23rd, the VICE-CHANCELLOR stated, that on inquiry it appeared that according to the practice of the writ and record clerks office, R. Bartley would not have been allowed to inspect the documents with the plaintiff; and his Honour decided accordingly, and refused the motion.

IN RE CREED.

(1 Drewry, 235—237.)

1852.
Nov. 23, 24.

A. left this country on the 9th November, 1829. On the 16th June, 1831, his brother-in-law received a letter from America on behalf of A., describing him as having changed his name to B. Three months after this, A.'s wife sent a letter to him, addressed to him as B., by the hand of a friend, who could not find him. He was not heard of any more, and it did not appear that any other inquiries were made by his family:

Held, that on this state of facts, there was not sufficient information to ground presumption of death, still less of the particular period of death.

[The VICE-CHANCELLOR interposed, pending the argument, on the ground that no sufficient inquiry had been made to justify any order, and the case was finally arranged out of Court.]

FULLERTON *v.* MARTIN

(1 Drewry, 238.)

1852.
Nov. 25.

[Supplemental proceedings under the old practice upon the birth of a necessary party are now provided for by Ord. xvii.]

HOWARD *v.* HOWARD.

(1 Drewry, 239—243.)

1852.
Nov. 25.

[Obsolete practice as to the examination of witnesses *visà voce*, under the Chancery Procedure Act, 1852.]

PEARCE *v.* WYCOMBE RAILWAY COMPANY.

(1 Drewry, 244—247.)

1852.
Nov. 11.

A Railway Company were building an embankment more than five feet above the level, according to the 11th and 12th sections of the Railway Clauses Consolidation Act. They had not given the notice required by the 12th section, but had obtained the consent required by the 11th. The COURT put them on terms to take the opinion of the Board of Trade, submitting to such order as this Court should thereafter make, otherwise an injunction would go to restrain the Company from proceeding with the embankment.

KINDERLESLEY,
V.-C.
[244]

THIS was a motion for an injunction to restrain the Railway Company from making or proceeding with the deviation in the bill mentioned, from the level of the Wycombe Railway, beyond the limits of five feet in the Railway Clauses Consolidation Act, 1845, mentioned.

The plaintiff was the owner of a house near which the defendants' railway was constructed. The defendants, the Company, were building an embankment to carry the Wycombe Railway over the common road, and building it much more than five feet above the level, within the meaning of the 11th and 12th sections of the Railway Clauses Consolidation Act. Whether the embankment prejudicially affected the plaintiff's land within the 12th section was matter of conflicting evidence; but it was admitted that the Company had not given the notice required by the 12th section. They had the consents required by the 11th section.

Mr. Swanston and *Mr. Nicholls*, for the plaintiff:

The circumstance of the Company not having given the notice required by the 12th section is conclusive. The proper tribunal to decide the question whether the land was prejudicially affected or not, is the Board of Trade, and the Company proceeding without

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having given the required notice, the plaintiff has a right to an injunction until that shall have been done.

[*215] *Mr. Malins* and *Mr. Jessel*, for the Company, cited the 6th and 66th *sections of the Railway Clauses Consolidation Act, and the 68th of the Lands Clauses Consolidation Act. As to the 11th section of the Railway Clauses Consolidation Act, the plaintiff does not come within it. He is not an owner within that section. As to the 12th section, the words, prejudicially affected, mean prejudicially within the 6th section of the Railway Clauses Consolidation Act, and the 68th section of the Lands Clauses Consolidation Act. * * *

[216] *Mr. Swanston*, before replying, said he consented to submit the question to the Board of Trade; the injunction going in the mean time, or the Company undertaking to abide by the order of the Court after the decision of the Board of Trade.

[*217] The Court intimating that if the Company would not submit to the order of the Court they could not be permitted to go on with the embankment pending the inquiry before the Board of Trade, the following order was ultimately arranged. The plaintiffs and defendants undertook to raise no objection to the jurisdiction of the Board of Trade, and to abide by the decision of that Board; and also to abide by such order as this Court should think fit to make if the Board of Trade decided. If the Board of Trade refused to adjudicate, liberty for either party to apply; the defendants undertaking in that *case to abide by such order as this Court should make as to their works, and on these terms the motion to stand over.

1852.
Dec. 2.

EX PARTE MOWATT.

(1 Drewry, 247—254.)

[Reversed, on appeal, as reported in 3 D. M. & G. 254.]

OXFORD, WORCESTER, AND WOLVERHAMPTON
RAILWAY COMPANY *v.* SOUTH STAFFORD-
SHIRE RAILWAY COMPANY.

1852.
Dec. 4, 6.

(1 Drewry, 255—264.)

A Railway Company had power “to make and maintain a certain railway and works,” but they were not to enter upon, take, or use any of the land or property of a certain pre-existing Railway Company, or in any manner to alter, vary, or interfere with that railway or any of the works appertaining thereto, save only for the purpose of effecting the junction thereby authorized in manner in the said Act authorized, and not otherwise; one of the clauses of the Act gave certain powers to the Company for effecting a junction with the pre-existing railway:

Held, that there being nothing to show that it was absolutely necessary for the Company, in order to effect the junction, it had no power to take as owners certain lands over which the line of the pre-existing railway actually passed; but there was a right to enter upon the lands, by way of easement, for the purpose of effecting the junction.

[This case depended upon the construction and combined effect of several special sections in an Act of Parliament which can scarcely be applicable to any other case.]

EX PARTE HOOPER (1.

(IN RE THE BUCKINGHAMSHIRE RAILWAY COMPANY.)

(1 Drewry, 264—269.)

1852.
Feb. 20.
March 4.

KINDERSLEY,
V.-C.

[264]

Land was devised to A. for life; remainder to all and every the children of her body, their heirs and assigns, as tenants in common; but in case A. should die without leaving any issue of her body, then over. A. had two children, both of whom died before her; one died leaving a child who survived A.; the other died without issue: Held, that the word “leaving” meant “having,” and that the two children of A. took vested interests as tenants in common in fee.

THIS was a petition by the Rev. John Hooper and Frances his wife, praying the payment to the said J. Hooper absolutely in right of his wife, of a moiety of a sum of money paid into Court by the Buckinghamshire Railway Company, for the purchase of certain lands, and the payment of the other moiety to the said J. Hooper and the trustees of the will of Henrietta Tookey, formerly Henrietta Prentice. The right to these monies *depended upon the construction of the will of Thomas Prentice, the father of Henrietta Tookey. The will of Thomas Prentice, so far as it regarded the devise to Henrietta Tookey, was as follows:

[*265]

“Also I give and devise unto my daughter Henrietta Prentice all

(1) Followed in *Treharne v. Layton* 508, affirmed 40 Ch. Div. 11, 58 (1875) L. R. 10 Q. B. 459. Distin- L. J. Ch. 232, 59 L. T. 800. guished in *In re Ball* (1887) 36 Ch. D.

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HOOPER.

that my copyhold messuages, tenements, or farm-house, situate and being in the parish of Little Horwood, in the county of Bucks, and also all those my several inclosed pieces or parcels of arable, meadow, and pasture ground, to the said messuage, tenement, or farm-house belonging, and therewith occupied, now in the tenure or occupation of John Willmer, containing together, by admeasurement, forty acres, with their and every of their rights, members, and appurtenances, to hold the same unto and to the use of my said daughter Henrietta Prentice and her assigns, for and during the term of her natural life; and from and immediately after her decease, I give and devise the said messuage, tenement, or farm-house, closes, pieces or parcels of arable, meadow, and pasture ground, with their and every of their rights, members, and appurtenances, unto and to the use of all and every the children of the body of my daughter Henrietta Prentice, lawfully begotten, (in case she shall leave more than one child,) their heirs and assigns for ever, as tenants in common, and not as joint tenants. But in case my said daughter Henrietta Prentice shall have only one child of her body, lawfully begotten, then I give and devise the said messuage, tenement, or farm-house, closes, pieces or parcels of arable, meadow, and pasture ground, with their and every of their appurtenances, unto and to the use of such one child, his or her heirs and assigns for ever. But in case my said daughter Henrietta Prentice shall happen to die without leaving any issue of her body, lawfully begotten, then I give and devise the said messuage, tenement, or *farm-house, closes, pieces or parcels of arable, meadow, and pasture ground, with their and every of their appurtenances, unto and to the use of all and every such child or children of my body, lawfully begotten, as I shall leave, or have living at the time of the decease of my said daughter Henrietta Prentice, and to their heirs and assigns for ever, as tenants in common" (1).

[*266]

Henrietta Prentice married Tookey, and had two children, John and Henrietta, both of whom died before her. John married, and by his will devised his interest in the property in question to his widow, who afterwards married the petitioner Hooper; and he died before his mother leaving a child, J. J. Tookey, who survived. Henrietta, the younger, died without issue, and, by her will, devised to her mother, among other things, her interest in the property purchased by the Railway Company. Henrietta Tookey the elder,

(1) There were two other devises in the will, which are not set out, as all that is material in them is noticed in the judgment.

by her will, gave certain property, including the property devised to her by her daughter Henrietta, to the petitioner J. Hooper and W. B. Eagles, upon trust. On the purchase of the land, part of the copyhold property devised by the will of Thomas Prentice, by the Company, there being a doubt whether the two children of Henrietta Tookey took vested interests in it, the Company paid the purchase-money, 680*l.*, into Court, and this petition was now presented by the Rev. J. Hooper and his wife, claiming a moiety for Mr. Hooper, in right of his wife, under the devise to her by her former husband, and the other moiety for himself and Eagle as trustees of the will of Henrietta Tookey, the widow.

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HOOPER.

Mr. Toller, for the petitioners, contended that the *children of H. Prentice took immediately on their births vested remainders in fee expectant on the decease of their mother; the words, "without leaving any issue," in the latter part of the devise, meaning, "without having any issue." He cited *Sturges v. Pearson* (1), and *Maitland v. Chalie* (2).

[*267]

Mr. Dickenson, for the grandson, J. J. Tookey, contended that H. Prentice took an estate tail.

Mr. Speed, for the Railway Company, said the Company ought not to pay any costs, the payment into Court and this application being the result of adverse litigation between the petitioners and the respondent J. Tookey. He referred to the 80th section of the Lands Clauses Consolidation Act.

THE VICE-CHANCELLOR:

March 4.

The order to be made on this petition depends on the construction of the will of Thomas Prentice, by which the testator devised certain copyhold property; and the question is, whether the two children of Henrietta Prentice, afterwards Henrietta Tookey, took under that will vested interests. (The VICE-CHANCELLOR referred to the devise to H. Prentice, set out *ante*, pp. 657, 658, and then proceeded :) The will contains two devises of other portions of real estate, one for the benefit of Mary Anne Prentice and her children; the other for the benefit of Thomas Eagle Prentice and his children. The three devises are in the same language, except as to one word in one of them, and that word, although not conclusive, is not without significance. The first devise is to Henrietta *Prentice.

[*268]

(1) 20 R. R. 316 (4 Madd. 411).

(2) 23 R. R. 209 (6 Madd. 243).

Ex parte
HOOPER.

It begins by a devise to Henrietta Prentice for life, "and from and after her decease unto and to the use of all and every the children of the body of my daughter Henrietta Prentice lawfully begotten, in case she shall leave more than one child, their heirs and assigns for ever, as tenants in common, and not as joint tenants." If the language stopped there, it is clear that every child would take a vested interest. The words that follow are: "But in case my said daughter Henrietta Prentice shall leave only one child of her body lawfully begotten, then I give and devise the said messuage, &c., unto and to the use of such one child, his or her heirs and assigns for ever." Passing to the limitation over, there can be no doubt that when the testator used the words, "But in case my said daughter Henrietta Prentice shall happen to die without leaving any issue, &c. of her body lawfully begotten, then I give and devise, &c. unto and to the use of all and every such child or children of my body lawfully begotten, as I shall leave or have living at the time of the decease of my said daughter H. Prentice, and to their heirs and assigns for ever, as tenants in common." He means by the words, "without leaving issue," without leaving issue at her death; and on the true construction of the devise over on her dying without leaving issue, the devise to such other children of the testator, means in case the daughter should die without leaving issue living at her death; and the limitation over, there being a grandchild, cannot take effect.

[*269]

Now what is the effect of the first series of limitations? The events that have happened are, that Henrietta Prentice had two children, both of whom predeceased her, but one left a child who survived Henrietta Prentice. I think that, in this case, the testator uses the word "leave" in the sense of "have." That meaning has *been applied to the word "leave" in many cases. The testator did not mean to make it a condition of the devise that the children of Henrietta Prentice should survive her. The words are, "to the use of all and every the children of the body of my daughter;" but in case she shall die without leaving any, then over. These words do not refer to Henrietta Prentice leaving, but to her having children. If that were not the construction, the testator would have died intestate, since there is no gift to the grandchild, and the gift over to the other children of the testator cannot take effect. That consideration is not conclusive, but it helps the construction. It is to be noticed also that there are two other devises in the will, one for Mary Anne and her children,

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another for a son and his children. And these two devises are precisely in the same language, with this single exception, that in the devise to the son, in the limitation after his death, the words are not in case of his leaving, but of his having more than one child; and with that exception the devises are exactly in the same language. That change in the language, though no doubt in fact inadvertent, may be used to show the meaning of the testator when he is imposing an apparent condition. I think, on these grounds, that the two children of Henrietta Prentice took vested interests as tenants in common in fee; each of them it appears made a will. The order, therefore, must be made in accordance with those devises.

The counsel for the Company not being present, the Court decided they must pay the costs, subject to anything their counsel might have afterwards to submit on that point. It was afterwards found that the usual order in such matters provided for the exception referred to in the 80th section of the Lands Clauses Consolidation Act, and the order was made accordingly.

MAYOR OF BASINGSTOKE v. LORD BOLTON.

(1 Drewry, 270—294.)

1852.
Nov. 5, 6.
Dec. 9.

[This was a hearing on demurrer of a suit which is subsequently reported on the final hearing in 3 Drewry, 50, to be contained in a later volume of the Revised Reports.]

SILVER v. STEIN (1).

(1 Drewry, 295—297; S. C. 21 L. J. Ch. 312.)

1852.
Dec. 15.

The 44th section of the 15 & 16 Vict. c. 86, did not apply to the case where the estate to which it was desired to appoint a representative was the estate being administered by the Court.

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V.-C.
[295]

A. died in a colony, and made colonial representatives and bequeathed his residue to B., who afterwards died. B.'s representative received from A.'s colonial representatives his residue.

The representative of B. was also a creditor of A.: Held, that, in a creditor's suit, the representative of B. could not be compelled to bring into Court the money so paid to him by A.'s colonial representatives.

THIS was a motion among other things under the 44th section of 15 & 16 Vict. c. 86, for the appointment of a person to represent

(1) The 44th section of 15 & 16 Vict. *City of Glasgow Life Assurance Co.*
c. 86, as slightly altered, now forms (1876) 4 Ch. D. 421, 46 L. J. Ch. 65,
rule 46 of Ord. XVI. See *Crossley v.* 36 L. T. 285.—O. A. S.

SILVER
v.
STEIN.

the estate of W. H. Lovewell, who died in the Mauritius, and for the payment into Court of a sum of money received by the defendant Arnold.

The suit was a creditor's suit for the administration of the estate of W. H. Lovewell, and was instituted against Stein and another, the colonial representatives of the deceased, and against G. Arnold.

The testator W. H. Lovewell had by his will given the residue of his estate to his mother, who died, making G. Arnold her executor. G. Arnold had received from the colonial representatives of W. H. Lovewell, as the representative of Mrs. Lovewell, a sum of about 70*l.* as and for the balance of their testator's estate. There was no representative of the testator in this country.

The defendant Arnold swore that he was a creditor of W. H. Lovewell to an amount exceeding the 70*l.*, for maintenance of Mrs. Lovewell during the lifetime, and by the express order, of W. H. Lovewell.

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Mr. Nalder, for the motion.

Mr. Greene, *contra*.

THE VICE-CHANCELLOR :

As to the first part of the notice of motion, the 44th section of the Chancery Practice Amendment Act does not appear to me to be intended to apply to cases where the estate to be represented, is the very estate which is being administered in the suit ; but only to those cases where a certain individual who, when living, was interested in the suit and was made a party, has died ; and then the Court may either appoint some person to represent that party, or may proceed without any representative.

As to that part of the notice of motion which prays an order against the defendant Arnold, that he may pay into Court the money which he has received, I am of opinion that such an order ought not to be made.

The plaintiff, a creditor of the original testator—I assume him at least to be a creditor, as he so represents himself—has a right to go against the legal personal representative, if he is administering the assets of the testator, and as against him, he might have the money in his hands brought into Court. But this defendant is not the representative of the testator at all. He is a person who, in his character of personal representative of the legatee of the testator, has received a sum of money as the balance of the

testator's estate remaining in the hands of the colonial executors. There is no doubt, of course, that a creditor may follow the assets of his debtor; but not into the hands of another creditor; he may follow them into the hands of a person having no right.

SILVER
".
STEIN.

But here the person who has received the money says *he has received it as the personal representative of the legatee of the original debtor, and he does not admit that he has it in his hands. As against the legatee's estate, it might no doubt be recovered, if she was not entitled to it.

[*297]

But here the defendant Arnold says that even if his testatrix was not entitled, he is himself a creditor of the original testator to a larger amount than the sum received by him, and that in that character he is entitled. And if, having such a right, he has got the money in his hands, I think it very questionable whether the Court could compel him to give it up. I think there is on this motion no ground for ordering the money into Court.

WHITE v. WILSON (1).

(1 Drewry, 298—306; S. C. 22 L. J. Ch. 62; 17 Jur. 15; 1 W. R. 47.)

1852.
Nov. 20.

A. made his will, and gave personalty to B., a married woman, for life, and after her death as she should appoint, and in default of appointment, to her husband.

KINDERSLEY,
V.-C.
[298]

B. had three children, and by her will she appointed, after her husband's death, 2,000*l.* between two of her children, and 1,500*l.* to the other, and she appointed the residue to her three children by name, in such manner as her husband should appoint by will. He by his will appointed 500*l.* to one of the children; () *l.* to another, and the residue to the third:

Held, that the husband had no power to exclude either of the children; that his appointment was therefore bad; and that the appointment of the wife took effect in favour of the three children.

LORD CHEDWORTH by his will gave 13,000*l.* in trust, to invest the same in the funds, and pay the interest thereof to Mary Howard, then the wife of William Howard, [for her separate use; and after her decease to pay the principal money to such person as the said Mary Howard should appoint; and in default of appointment, to her husband, the said William Howard; or in case he predeceased her, to her children. Mary Howard made her will dated the 23rd March, 1842, which recited that, in a suit in Chancery, in a cause

(1) *Bulleet v. Plummer* (1869) L. R. 8 Eq. 585, reversed, L. R. 6 Ch. 160, 23 L. T. 753. As under 37 & 38 Vict. c. 37, appointments made since the 30th July, 1874, in exercise of a power may

exclude any particular object of the power, the principal point in this case will have little future application.—O. A. S.

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entitled *White v. Wilson*, the said legacy or sum of 13,000*l.* was laid and invested in the purchase of 19,082*l.* 11*s.* 4*d.* Bank 3*l.* per cent. Annuities in the name of the Accountant-General, and she thereby appointed the said 19,082*l.* 11*s.* 4*d.* Bank 3*l.* per cent. Annuities to her husband the said William Howard, upon trust, within six months after her decease to transfer to her son John William Howard 1,000*l.* Annuities, part of the said fund, and to her son Frederick Robert Howard 1,000*l.* Annuities, other part of the said fund, and to her daughter Harriett Mary Ann Howard 5,000*l.* Annuities, further part of the said fund, for her separate use, and to her said husband 5,500*l.* Annuities, further part of the said fund, to enable him to discharge certain liabilities devolving upon him at her decease, and for his own use; and she thereby directed that, after payment of such legacies, her funeral expenses, and the charges of proving that her will, and all incidental costs, charges, and expense, which the said William Howard might be put to in or about the execution of that her will, and otherwise relating thereto, the residue of the said fund of Bank Annuities be set apart and invested in Bank Annuities or on mortgage as he might think best, and the dividends or interest thereof be received and retained by him during his life; and as to the principal sum constituting such residue, she directed and appointed, gave and bequeathed out of the same, after the decease of the said William Howard, the sum of 2,000*l.*, in equal shares, to and between her said sons John William Howard and Frederick Robert Howard; also the sum of 1,500*l.* to her said daughter Harriett Mary Ann Howard for her separate use; and also the sum of 100*l.* to her grand-daughter Catherine Harriett Howard, and the residue thereof to her children the said John William Howard, Frederick Robert Howard, and Harriett Mary Ann Howard, or their respective executors and administrators, in such manner as her said husband William Howard should, in and by his last will, appoint.

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Mr. Howard duly made his will dated the 14th August, 1851, as follows:—“This is the last will and testament of me, William Howard, of number 42, Western Villas, Blomfield Road, in the county of Middlesex, gentleman. Whereas, in and by the last will and testament of my late wife Mary Howard, she hath directed that the residue of the sum of 19,082*l.* 11*s.* 4*d.* 3*l.* per cent. Bank Annuities, in her will more particularly mentioned, after the transfer and payment thereof of the funeral and testamentary expenses, legacies, debts, and liabilities therein referred to, shall, upon my

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decease, be paid to John William Howard, Frederick Robert Howard, and Harriet Mary Ann Howard, in such shares and proportions as I shall by my last will and testament direct or appoint. Now in exercise of such power, I do hereby direct, order, and appoint the sum of 500*l.* sterling to be paid to the said Harriett Mary Ann Howard; the sum of () sterling to be paid to the said Frederick Robert Howard, (he having been already more than sufficiently provided for,) and the residue and remainder thereof to be paid to the said John William Howard."

Mary Howard died in 1851, leaving three children surviving. W. Howard died in 1852.

A petition was now presented on behalf of John William Howard and another, claiming a sum as residue *(after raising the several sums of 2,000*l.*, 1,500*l.*, and 100*l.*, given by the will of Mrs. Howard, and the 500*l.* given by the will of W. Howard,) as passing to him under the will of W. Howard.

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Mr. Daniell and *Mr. C. Clement Berkeley*, for the petition :

* * The two instruments, the will of the wife and the will of the husband, must be read together ; and if you so read them, all the children take some share. * * *

Mr. Amphlett, for F. R. Howard, who claimed as *one of the children entitled in default of appointment of the husband, [cited *Alleyway v. Alloway* (1) and *Kemp v. Kemp* (2)].

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Mr. Speed, for another child in the same interest :

The only appointment which takes effect is that made by the wife. * * *

Mr. Daniell, in reply. * * *

The VICE-CHANCELLOR referred to the will of Lord Chedworth, and proceeded as follows : The wife exercised her power, a general absolute power to appoint, at any rate by will. Now it is not questioned that her will was a valid execution of her power, and by it, reciting her power, she appoints. (The VICE-CHANCELLOR referred to the will of Mrs. Howard.) Now it is not, as I understand, contended that Mrs. Howard had no power to delegate to her husband her power to appoint, and if it had been so contended, I should decide that the argument could not be sustained. It is clear that when a

(1) 65 R. R. 717 (4 Dr. & War. 380).

(2) 5 R. R. 182 (5 Ves. 849).

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person has an absolute power of appointment, he may appoint to certain persons or classes of persons in such shares as another person shall nominate. The question then is, did Mr. Howard exercise his power, and what is the effect of his act? (The VICE-CHANCELLOR referred to the will of Mr. Howard.) Now, with reference to the intention of Mr. Howard, it is contended that he must have intended that F. R. Howard being, as he recites, more than sufficiently provided for, he did not intend to appoint to him. But it is not, I think, at all clear that he did not mean to appoint something to F. R. Howard. Assuming that the will was prepared, as stated, by a professional person, with blanks to be filled up, it seems that he filled *up the blank left for Harriett's name, and left that for Frederick Robert not filled up. That does not conclusively show that he intended to leave the blank altogether. He may have felt hesitation, and deferred the consideration of what should be inserted to be paid to his son F. R. Howard. If he had intended to appoint nothing to that son, he would not have allowed the clause to remain at all; for to say, I appoint nothing to be paid to Frederick Robert would have been nonsense. Looking therefore at the language of the testator, there is no conclusive evidence that he intended to give nothing to this son. But even if I could suppose he had an express intention to appoint nothing to one of his children, still if the power given to him did not justify him in making an exclusive appointment, then, although if he had given, as it has been suggested, five shillings, that would have been good, yet as he has given nothing, I cannot determine that a power to appoint to three, authorizes an appointment to two. The result is, that the husband's appointment had no operation at all; as to one of the children he has appointed nothing, and such an exclusive appointment was not justified. The terms of the power given to him are express: the wife, having a general power, determines who are the parties to take; she does not leave it to her husband; she determines who is to take, leaving it only to her husband to determine the manner in which they should take. The question then comes, whether, on the construction of Mrs. Howard's will, she gives to her children, &c. (The VICE-CHANCELLOR referred to the passage, p. 664.) Now on the authorities it is clear, that if a person, having power to give, gives to certain persons as another shall appoint, and that other makes no appointment, assuming it to be a bequest, there is an implied gift to the objects of the gift, if the power is not exercised by the party having the right to exercise it; and that being *the effect, if

it had been a bequest by Mrs. Howard, should a different construction be adopted because it is an appointment by her of Lord Chedworth's estate? The authority to her is general and absolute. I assimilate the questions of bequest and appointment, merely for the purpose of determining whether there is any different rule of construction as between the two; and I think there is no reason for saying that there is any distinction. I am on the whole of opinion, that the effect is, that Mrs. Howard has well appointed the residue of her property, in default of her husband exercising his power, to the three children named; and the order will be accordingly, that the residue will be divided between those three children.

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ROBINSON *v.* HARRISON.

(1 Drewry, 307.)

1852.
Dec. 11.

A PETITION was presented by a single woman, and answered on the 1st December. On the 2nd, before the petition was in the paper, she married.

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Mr. Metcalfe applied for leave to amend the petition, by making it the petition of the husband and wife, without a fresh stamp.

The VICE-CHANCELLOR, having conferred with the other Judges, held with their concurrence, that the petition might be amended without a fresh stamp.

BOWEN *v.* PRICE.

(1 Drewry, 307.)

1852.

Old practice. Delivery of interrogatories.

[See now Ord. XIX. r. 10.]

KING *v.* MULLINS.

(1 Drewry, 308—311; S. C. nom. *King v. Mullings*, 20 L. T. O. S. 178.)

1852.
Dec. 21.

A trustee, paying the trust-money in strict accordance with the tenor of the trusts, is not entitled to a release by deed; *secus*, if he is called upon to depart from the strictly expressed trusts.

KINDERSLEY,
V.-C.
[308]

Where a trust was created by parol for A. for life, and to provide for her funeral expenses, remainder to her two children, and the tenant for life and remaindermen called for payment:

Held, that the trustee might lawfully insist on a release under seal.

In this case a trust had been created by parol of a small sum of money for A. for life, remainder to B. for life, and to pay the

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*
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expenses of her funeral, remainder to her two children. A. died, and then B. and her children joined in calling upon the trustee to pay the trust fund to them. One question was, whether the trustee was entitled to a release under seal, or whether only to a receipt expressing the nature and satisfaction of the trusts.

Mr. Lewin, for the cestuis que trust, [cited *Chadwick v. Heatley* ()].

Mr. Wigram and Mr. Roxburgh, for the trustee, [distinguished *Chadwick v. Heatley* :

All that was decided there was, that where the effect of the trusts is beyond all dispute, and the only question is, whether the account is correct, and the balance correctly ascertained, the trustee is entitled to have his accounts examined and passed, and to have a receipt in full of all demands in respect of the accounts. They cited *Goldsmid v. Goldsmid* (2).]

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Mr. Lewin, in reply.

THE VICE-CHANCELLOR :

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On the question whether it is the strict right of a *trustee to demand a formal release ; I am of opinion that in the case of a declared trust, where the trust is apparent on the face of a deed ; the fund clear ; the trust clearly defined ; and the trustee is paying either the income or the capital of the fund ; if he is paying it in strict accordance with the trusts, he has no right to require a release under seal. It is true that in the common case of executors, when the executorship is being wound up, it is the practice to give executors a release. An executor has a right to be clearly discharged, and not to be left in a position in which he may be exposed to further litigation ; therefore he fairly says, unless you give me a discharge on the face of it protecting me, I cannot safely hand over the fund ; and therefore it is usual to give a release ; but such a claim on the part of a trustee would in strictness be improper, if he is paying in accordance with the letter of the trust. In such a case he would have no right to a release. That, however, is not this case ; here there is no deed at all, no writing declaring the trust ; there is a small sum of money in the hands of the plaintiff, with nothing but a verbal expression of the trusts. The evidence showing what the trusts were, indicates that upon

the very tenor of those trusts, they could not be completely carried out until the death of the tenant for life. Considering that, in the first place, there was no writing to indicate either what the trusts were or the amount of the trust fund; and, in the second place, that what the trustee has been asked to do is not in accordance with the tenor of the trusts, I am of opinion that in this case it was not illegal in the trustee to demand a release by deed.

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WHITE v. COHEN (1).

(1 Drewry, 312—318.)

1852.
Dec. 21.

KINDERSLEY,
V.-C.

[312]

A bill was filed by a married woman in respect of certain houses forming part of her separate property, alleging a nuisance by reason of a noisy trade which depreciated the value of the houses and disturbed the rest of the tenants, who threatened to leave her houses, one of which was occupied by herself and her husband.

The evidence as to the nuisance was conflicting, and no action had been brought:

Held, that the nuisance, if there was one, was not irremediable, but capable of compensation by damages; and there could be no injunction till the right was established at law.

THE bill in this case was filed by Jane White, by her next friend, against Philip Cohen, against Charles Frederick White, the husband of the plaintiff, and against some other persons. It alleged that the plaintiff's father bequeathed to her certain leasehold property at Kennington, and that on the marriage of the plaintiff with the defendant, C. F. White, a settlement was executed, by which certain houses, viz., No. 18, Pilgrim Street, Nos. 7 and 8, Montford Place, and 17 and 19, Pilgrim Street, were settled on the plaintiff for her life for her separate use. That in the month of August, 1851, Ward and Patteson erected upon land of their own, closely adjoining plaintiff's leasehold houses, a glass bottle manufactory, and thenceforth conducted the business of such factory so as not to be a nuisance or annoyance to the neighbourhood, or to the plaintiff, or the tenants of her dwelling-houses; that in the month of August, 1852, Ward and Patteson sold their factory and business to the defendant, Philip Cohen, who had since conducted and carried on in the said factory the said business of glass-bottle making in such a manner as to become an intolerable nuisance and annoyance to the neighbourhood, and, in particular, to the plaintiff, and her husband and family, and to the tenants of the said dwelling-houses. The plaintiff and her husband and family resided in one

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of the houses, No. 7, Montford Place, and the others were let to respectable tenants at rents varying from 18*l.* to 26*l.* per year ; and then *followed these allegations: The works of the defendant, Philip Cohen, at the said factory have lately been, and still are, carried on chiefly or very much by night, and also on Sundays, and the noise occasioned thereby is so great as to disturb the rest of the several persons residing in the said dwelling-houses, and to prevent their sleeping. The mode in which the said works are carried on by the defendant, Philip Cohen, tends greatly to depreciate the value of the said dwelling-houses, and several of the tenants threaten to leave the same in consequence thereof.

The bill prayed an injunction to restrain the defendant Cohen and his agents from carrying on the said business and works of the said glass-bottle making at the said factory occupied by him, or from carrying on the same in such manner as to occasion any nuisance, disturbance, and annoyance to the plaintiff, and her husband and family, residing in their said dwelling-house in Montford Place, or to the tenants and occupiers of the others of the said dwelling-houses in Montford Place and Pilgrim Street.

A motion was now made for an injunction in the terms of the prayer of the bill against Cohen. [Affidavits were filed in support of the motion, one of the allegations of which was:] “That the works of the defendant had lately been and were still chiefly carried on by night, and also on Sundays, and the noise occasioned thereby was so great as to disturb the rest of the deponents and of the other persons residing in the plaintiff’s dwelling-houses, and to prevent their sleeping at night ; they said that such disturbances at night had not been confined to particular instances, but had been continued generally, and in a greater or less degree since *the defendant had carried on his works. * * The plaintiff swore that the mode in which the defendant carried on his business tended greatly to depreciate, and did, in fact, depreciate, the value of her property, and that several of the tenants threatened to leave in consequence. The fact of the great and continual noise, and of its disturbing their rest at night, was also verified by some of the plaintiff’s tenants, and they said that they *could not continue as tenants, and did not intend to continue to occupy the premises occupied by them, unless the nuisance were discontinued. Then it was sworn that the houses 17 and 18, Pilgrim Street were distant fifty-three feet from the factory, that 19, Pilgrim Street was sixty-nine feet from it, and

7 and 8, Montford Place were seventy feet from it. This was the material evidence on the part of the plaintiff.

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[The affidavits on behalf of the defendant Cohen, which included affidavits by several witnesses residing in the immediate neighbourhood, negatived the general allegation of the plaintiff's evidence, as to the noise being a nuisance.]

Mr. Bacon and Mr. J. T. Humphry, for the motion.

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The VICE-CHANCELLOR, before hearing them upon the merits, suggested a preliminary difficulty arising out of the frame of the suit; whether the plaintiff could sue alone, or by her next friend, in respect of a personal nuisance to herself and her husband. If she sues only on the ground of injury to her property, that is not of itself a nuisance. Suppose the plaintiff was away at a great distance from her property, and the bill alleged great injury to the value of her property, but no personal annoyance to herself; it has been repeatedly decided that mere diminution of value in property, is not a ground of proceeding as for a nuisance.

Mr. Bacon and Mr. Humphry cited *Elmhirst v. Spencer* (1) and *Soltau v. De Held* (2):

This is a case of mixed kind: it is injury to property, productive of nuisance. It is not mere nuisance personally to the plaintiff and her husband, but it is that species of annoyance which prevents her, through herself and through her tenants, from enjoying her property in the way in which she is entitled to enjoy it, viz. as her separate estate. It would be improper to join her husband with her, because the nuisance is not mere personal nuisance, but nuisance combined with injury to property; and he has no interest in the property. It may be true that mere depreciation of property is no nuisance; but all nuisance is in respect of the enjoyment of some right of property; and there can be no nuisance in point of law, except as connected with some such enjoyment.

Mr. Daniell and Mr. Elderton, for the defendant, were not called upon.

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THE VICE-CHANCELLOR:

The question now before me is, whether, until an action has been brought, the defendant ought to be restrained from carrying on his

(1) 86 R. R. 16 (2 Mac. & G. 45).

(2) 89 R. R. 245 (2 Sim. N. S. 133).

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works: that is the only question. It is not disputed that this Court cannot permanently restrain acts alleged to be nuisance, until a court of law has declared that they do constitute nuisance. If in the interim, on a bill being filed, I restrain the defendant, I am *pro tanto* acting on the assumption that there is a nuisance. Now, no doubt if the nuisance, supposing it to be one in point of law, were one of an irremediable kind, one not capable of compensation, this Court might impose terms, pending the trial of the question of nuisance, to protect the property in its existing state. But in a case where the only questions are mere inconvenience to the parties by the alleged noise disturbing more or less their sleep, or in reference to the diminution of value of the plaintiff's property; in either case the injury is not irremediable, but is capable of compensation in damages. I feel so much doubt, also, whether the plaintiff can maintain this suit at all, that I should feel great difficulty on that ground alone; and on the whole, until it shall first have been determined at law that there is a nuisance; and, secondly, that, if there is a nuisance, the plaintiff has taken the right course, considering that this bill rests, as it appears to me that it does, merely on the ground of diminution in value of the property; I think the only order that I can make will be for the motion to stand over, with liberty for the plaintiff to bring such action as she may be advised.

IN RE BURTT'S ESTATE (1).

(1 Drewry, 319—321.)

1853.
Jan. 11.
KINDERLEY,
V.-C.
[319]

A bequest was made of leasehold property to A. and B., their executors and administrators, as trustees. B., the surviving trustee, by his will bequeathed all trust estates vested in him to C. and D., their heirs, executors, administrators and assigns, on the trusts affecting the same; and he appointed C., D., and E., executors of his will: Held, that C. and D. took only the legal estate, and that neither C. and D., by themselves, nor C., D., and E. were capable of executing the trusts.

ON this petition, the object of which was to have the dividends of a sum of money which had been paid into Court by a Railway

(1) See now the Conveyancing Act, 1881, s. 30, which vests all trust estates (other than copyholds) in the general personal representatives of the last surviving trustee who dies after 1881, notwithstanding any testa-

mentary disposition by heirs to the contrary: as to which see *In re Parker's Trusts* [1894] 1 Ch. 707, 63 L. J. Ch. 316, 70 L. T. 165; and see also the note to *Cloke v. Crawford* (13 Sim. 91) in 60 R. R. at p. 303.—O. A. S.

Company, paid out to the petitioners, a question arose as to the power of trustees to bequeath the trusts.

In re
BURTT.

The will of John Burt was as follows :

He gave, among other things, to John Richards and Robert Bromfield Potter, their executors and administrators, all his leasehold messuages, tenements, or dwelling-houses situate and being in or near to Livery Street and Cox Street, respectively in Birmingham, and all and every his ground rents payable for lands there situate, and all other his personal estate, to hold unto the said John Richards and Robert Bromfield Potter, their executors and administrators, upon trust out of the rents and profits thereof to pay the ground rents and all necessary outgoings, and to keep the same leasehold estate in good and sufficient repair, and subject thereto, upon trust to pay and apply the said rents and profits to and among the persons and in the manner in his will mentioned ; and the said testator thereby appointed John Richards and Robert Bromfield Potter executors thereof.

Richards died in 1833. Robert Bromfield Potter *died in 1852, [*320] having first made his will and a codicil thereto.

By his will, which bore date the 2nd of February, 1848, he gave, devised, and bequeathed all the estates vested in him on any trust, or by way of mortgage, to the petitioners and to one Thomas Clarke, their heirs, executors, administrators, and assigns, according to the respective nature and quality thereof respectively, to hold the same upon the same trusts and for the same purposes for which he held the same, and to be disposed of accordingly ; and he thereby appointed his wife executrix, and the petitioners and the said Thomas Clarke, executors of his will.

Robert Bromfield Potter, by the codicil to his will which bore date the 13th of April, 1852, revoked the appointment of Thomas Clarke, as an executor and trustee of his will, but did not otherwise alter his will so far as was material to the question.

On the petition being opened, the VICE-CHANCELLOR observed, that he did not see that the petitioners were the trustees of Burt's will. R. B. Potter had no authority to bequeath the execution of the trust. He could only pass the legal estate.

Mr. Sargent, for the petitioners, then applied for leave to amend by joining the name of the widow of Potter to those of the petitioners, thus making the petition that of the executors of Potter. He contended that if Potter had not attempted to bequeath his

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trust, his executors would unquestionably have been competent trustees; and that, by thus amending the petition, and making the trustees of Potter's will and Elizabeth *Potter all co-petitioners, the petition would be that of both classes,—that of the legatees of the legal estate, and also that of R. B. Potter's executors.

The VICE-CHANCELLOR held, that neither the petitioners alone as trustees, nor the petitioners joined with the other executrix, could exercise the trusts; he said the testator had himself declared that his executors as such, should not be trustees; and since by the bequest, he had taken away the legal estate from those persons who ought otherwise to have been the trustees, the appointment of new trustees was requisite.

1853.

Jan. 17.

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V.-C.

[321]

IN RE HOLMES' TRUSTS (1).

(1 Drewry, 321—325.)

A testator gave legacies to various legatees by name, and some to classes described, but the persons composing which were not named; he gave his residue to his legatees specially named, except one of the classes described: Held, that this showed that by the words "specially named," the testator meant, "described," or "mentioned"; and that all the legatees, whether named, or only described, took shares.

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W. HOLMES by his will devised and bequeathed his freehold and leasehold estates, and the residue of his property, estate, and effects, both real and personal, to trustees, in trust to sell his freehold and leasehold estate, and to get in his personal estate, and to stand possessed of the produce, in trust, out of a competent part of his personal estate, to purchase so much *3l.* per cent. Consols as would produce a yearly dividend of *5l. 12s.*, in the joint names of the vicar, and the churchwardens, and overseers of the poor for the time being of the parish of *Lewisham, to be held by them upon trust, and to the intent and purpose that the vicar, churchwardens, and overseers of the poor for the time being of the said parish, and their successors for ever, should lay out the said yearly dividend or sum of *5l. 12s.* yearly and every year for ever, in the purchase of seven pairs of blankets, and distribute the said blankets on St. Thomas' Day, unless that feast should happen on a Sunday, and then on the Monday following St. Thomas' Day, in every year for ever, to and amongst seven poor and industrious families, parishioners of Lewisham aforesaid, who should not be receiving parochial relief, and who should not also, during the year in which such distributions

(1) *Seale-Hayne v. Jodrell* [1891] A. C. 304, 61 L. J. Ch. 70, 65 L. T. 57.

and divisions should be made, receive or have received any other gift or donation, under any charity bequeathed to the said parish of Lewisham.

Then followed several legacies to legatees expressly named ; then “to the testator’s faithful servant Ann Burchell 100*l.* ; to his faithful servant James Wathling 20*l.* ; to each of his other servants who should be in his service at the time of his decease the sum of 10*l.*” Then came other legacies to persons named. Then followed other bequests to classes described, but not expressly naming the persons constituting such classes ; among these were the brothers and sisters of his late cousin John Scatchard ; the children of his niece Catherine Briggs, and others ; and then followed the residuary clause as to the “surplus or residue of the aforesaid trust-monies which should remain after payment of the several legacies thereinbefore bequeathed, and the purchase of the several sums of stock aforesaid, &c.” The testator gave and bequeathed the same unto his several legatees thereinbefore specially named, exclusive of the objects taking under the trusts for the purchase and distribution *of blankets, equally share and share alike, to and for their several and respective own absolute use and benefit.

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A reference being made, upon a petition in this case, to the Master to ascertain who were the legatees specially named in the will of the testator, and the personal representatives of such as were dead, the Master found that certain persons were the legatees specially named, but he did not include in the list the brothers and sisters of John Scatchard, nor any of the classes or persons described but not named.

There was a residue of 1,212*l.* 5*s.* 5*d.*, and, on the present petition being presented to confirm the Master’s report, the question was, whether the petitioners, the persons found by the Master to be the persons specially named, were alone entitled to the residue, or whether the brothers and sisters of John Scatchard, the children of Catherine Briggs, and the other persons described but not named were entitled to share with them.

Mr. E. F. Smith, for the petitioners.

Mr. Walker, for the Scatchards and another class described, cited *Bromley v. Wright* (1).

Mr. Steere, for the trustees.

(1) 82 E. L. 136 (7 Hare, 334).

In re
HOLMES.

THE VICE-CHANCELLOR :

No doubt the strict and accurate meaning of the terms specially named, is persons mentioned *nominatim*, if not by all their names, by some at least, either their Christian or their surnames.

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If the words had been specially mentioned, then the word “specially” would have meant, not expressly named, but mentioned as special donees.

In *Bromley v. Wright* the legatees were not named; that is not *nominatim*; yet it was held that the testator giving his residue to the legatees “before-named,” that meant before-mentioned; and that the legatees mentioned were included, though not expressly named; that is, the word “named” was used as mentioned. The question in this case is, whether in the residuary clause the testator meant to include such of the legatees as he has mentioned *nominatim*; or did he mean such of the legatees as he had before mentioned simply.

In looking at the various legacies referred to, where the legatees are not named, it is to be observed that they are legacies to classes. Now, as to some of those classes, it may be that the individuals composing them were well known to the testator; or it may be that he did not know them all, and that it was more convenient to describe them as a class. As to the servants, the gift is first to two of his servants by name, and then “to each of my other servants who shall be in my service at the time of my decease;” these he could not possibly name, because he could not, at the date of his will, know who would be in his service at the time of his death.

On the question, then, in what sense the testator used the words “specially named,” he has himself given the key to the interpretation of his meaning. If he meant to give his residue to those only whom he mentioned *nominatim*, why should he exclude from participating in that gift, a class of persons who are not specially named, and who yet take legacies? (His Honour referred *to the gift in trust to invest, to produce 5*l.* 12*s.* per annum to distribute blankets.) Under this clause the testator must have considered that unless he specially excluded the parties to take under it, they would take a share of the residue. He has, by expressly excluding them, himself given a clue to the interpretation, or rather a clear enunciation of the interpretation which he puts on the words “specially named.”

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I cannot, without disregarding what the testator has himself told us, put any other interpretation on the words than that the testator meant by them, legatees specially mentioned. I do not by this at

all decide that generally the word "named," is as strong as "specially named;" but only that here the word "specially," is not used for the purpose of describing those who are mentioned *nominatim*, but for the purpose of describing those legatees to whom a special benefit is given.

In re
HOLMES.

I see no distinction between the gift to the servants, and the gifts to the other classes described; and I am of opinion that all the legatees, whether described *nominatim* or not, excluding of course those who take under the gift for the distribution of blankets, take shares in the residue.

IN RE KINCAID'S TRUSTS.

(1 Drewry, 326—330; S. C. 22 L. J. Ch. 395; 17 Jur. 106; 1 W. R. 120; 20 L. T. O. S. 243.)

1853,
JAN. 17.
—
KINDERSLEY,
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Where a married woman was entitled to a fund of 153*l.*, her husband bankrupt, and unable to maintain her: Held, as between her and her husband's assignees, that the whole should be settled on her.

THIS was the petition of Mrs. Mowat, formerly Caroline Kincaid, a daughter of Sophia Kincaid. By a deed of the 8th February, 1839, Sophia Kincaid, the mother of the petitioner, declared the trusts of a policy for 500*l.* on her life, for certain payments, and subject thereto, in favour of her two daughters Caroline and M. A. Kincaid, equally, on their attaining twenty-one or marriage. The settlor died in 1851. The trustees paid into Court 307*l.* 5*s.* 11*d.* as the balance in their hands in trust for the two daughters of Sophia Kincaid.

Caroline, in 1845, married Archibald Mowat, who became bankrupt in 1851.

[There were three children of the marriage.]

Mrs. Mowat, the petitioner, asked for a settlement of her moiety.

There was no property besides the fund claimed; the husband had not had any of the wife's property, and there were in fact no special circumstances except the bankruptcy of the husband, his inability to maintain his wife, and the fund being small.

Mr. Walford, for Mrs. Mowat, [cited *In re Cutler* (1) and other cases].

Mr. J. H. Palmer, for the assignees. * * *

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KINCAID.
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THE VICE-CHANCELLOR, without calling for a reply, [after making some general observations, stated his approval of *In re Cutler*, and said]:

In the ordinary case of there being no special circumstances, the course of the Court, not the rule,—for there is no positive rule,—is to say that the wife shall have half, and the husband or his assignees the other half. But if there are special circumstances, then a different course is adopted, and the Court will give either the whole fund, or a different proportional part. Here the special circumstance is, that the husband is in a condition to be wholly unable to support his wife. The wife and children have no other support beyond the fund, which does not exceed 153*l*. If half of that were *to be given to the husband's assignees, and half to be settled on the wife, it would be a mere delusion, a mockery, to call that a settlement. When the husband has by reason of insolvency, no means of maintaining his wife, and there is no property, except so small a fund as this, that appears to me to be a sufficient special circumstance to justify the Court in settling the whole on the wife.

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1853.
Jan. 18.
—
KINDERLEY,
V.-C.
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SWEETING v. SWEETING (1).

(1 Drewry, 331—337; S. C. 22 L. J. Ch. 441; 17 Jur. 123; 20 L. T. O. S. 288.)

A testator gave to his sons certain real estates, with power to appoint to any woman they might respectively marry, a jointure in bar of dower: Held, that an appointment under this power was a gift within the Legacy Duty Act, 1805 (45 Geo. III. c. 28), and liable to legacy duty.

THIS was a petition by the *Attorney-General*, praying that the receiver in the cause might be directed to pay to the Commissioners of Inland Revenue, the sum of 425*l*. 17*s*. for legacy duty, out of the rents and profits of certain estates.

John Sweeting, by his will dated 20th November, 1844, among other things gave power to his sons, when in possession of the manor and lands devised by his will, by deed [of] appointment in writing, attested by one or more witness or witnesses, to limit and appoint to or in trust for any woman or women whom he or they should respectively marry, and that, either before or after such marriage or marriages respectively, for the life or lives of such woman or women respectively, for her or their jointure respectively, and in bar of dower, any annual sum or rent charge, not exceeding 400*l*. per annum, to be issuing out of and chargeable

(1) By 51 & 52 Vict. c. 8, s. 21 (2), legacies charged upon or payable out of real estate are now chargeable with

succession duty instead of legacy duty where the testator has died since June, 1888.—O. A. S.

on any part of the said lands or hereditaments, (viz. certain lands and hereditaments devised by the will) whereof he or they should be in possession; with the usual powers and remedies for receiving the same.

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v.
SWEETING.

The testator died shortly after making his will, leaving his eldest son and heir-at-law, John Hankey Sweeting, who entered into possession, under the will of his father, of certain lands devised to him for life only, with remainder to his children as he should appoint; with remainder, in default of appointment, to his children as tenants in common in tail general; with cross remainders. *John Hankey Sweeting married the respondent Amelia Augusta Sweeting, and died, leaving her his widow, having previously by deed appointed to her for life for her jointure and in bar of dower, two annuities, amounting together to 300*l.*, free and clear of all taxes and deductions, and charged upon the lands devised to him for life with remainders over, as above mentioned. He died in 1841, without having appointed to his children, leaving children who, on his death, became entitled as tenants in common in tail. The widow enjoyed the annuity from the death of her husband, but never paid any legacy duty upon it. She was a stranger in blood to the testator John Sweeting.

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The *Attorney-General* now presented his petition to have the sum of 425*l.* 17*s.*, the proper amount of legacy duty, at the rate of 10*l.* per cent., paid by the jointress (1).

Mr. W. M. James, for the *Attorney-General*, cited *Attorney-General v. Lord Henniker* (2), *Attorney-General v. Pickard* (3).

Mr. Follett and Mr. Kinglake, for the jointress, cited *Burridge v. Braddyl* (4), *Blower v. Morret* (5), *Heath v. Dendy* (6) :

In this case there is the absence of that which would bring the case within the Acts 45 Geo. III. c. 28, and 36 Geo. III. c. 52 (7). It is not a gift. The cases cited on the other side are cases distinguishable from this. The distinction between *Attorney-General v. Henniker* and *this case is this : here the testator himself directed the appointment to be as a jointure, and in bar of dower.

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(1) Under s. 11 of the Succession Duty Act, 1853, a husband or wife now pay duty at the lowest rate payable if either had been as near a relation as the other to the testator or predecessor.—O. A. S.

(2) 86 R. R. 668 (7 Ex. 331).

(3) 3 M. & W. 552; 6 M. & W. 348.

(4) 1 P. Wms. 127.

(5) 2 Ves. Sen. 420.

(6) 25 R. R. 135 (1 Russ. 543).

(7) See the extension of these Acts by 8 & 9 Vict. c. 76.

SWEETING
 ?
 SWEETING.

The question is, whether such a provision contained in a will, is a gift when it is made in favour of a person, a stranger to the testator.

In the 4th section of the 45 Geo. III. c. 28, the words "gift" and "given" govern the whole clause. Unless there is a gift it is not a legacy chargeable. Here there is no gift; there are no words expressing gift, and no subsequent acts, treating it as a gift. Indeed it is absolutely essential to the effective execution of the power, that the donee shall treat the provision not as a gift. The son could not treat it as a gift. The testator gave to the son power to purchase an immunity from dower. It is said there is no estate out of which dower could issue; and therefore there is no consideration; but the son might have other estates; besides, he was the testator's heir-at-law. The testator was therefore in effect relieving his own estate in favour of his successors. At any rate, if it is a gift at all, it is a gift for the benefit of the son, and the duty ought not to be 10l. per cent.

Mr. W. M. James, in reply :

This case does not differ from the case in the Exchequer, *Attorney-General v. Henniker*; and the only real argument on the other side is, that the decisions of the Exchequer in matters of revenue are not to be relied on. The appointment must be read as if it were in the original will. It is therefore a gift of an annuity by the testator to his son's wife in lieu of her dower. That, it is said, distinguishes it from *Lord Henniker's* case. But it is not a distinction; the son is merely enabled to do what, in *Henniker's* case, he actually did. But here there was no estate out of which the wife was dowable. *Besides, the instruments were all post-nuptial and voluntary. But if the wife was a purchaser, that would only be a question what was the value of her dower. Then it is said there is a condition; but that does not prevent legacy duty attaching. If it will, a condition to relinquish any fictitious claim might shut out legacy duty, and so the Crown could always be defeated.

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THE VICE-CHANCELLOR :

The question in this case arises upon the 4th section of 45 Geo. III. c. 28. Now, in order to decide this case, it must first be considered what are the cases of liability with regard to gifts of personal estate. If a testator gives a legacy out of personalty, on condition of the legatee doing some act, such as, for instance, taking

the arms and name of the testator, I can have no doubt about the legacy being liable to duty; so if a legacy were given to A., out of personal estate, on condition that he should convey an estate of his to a third party, the legacy would be liable to duty. Again, suppose this case; of a testator having a daughter, a widow, with children, and giving her a sum of money or an annuity, out of personalty, on condition of her maintaining her children; there can be no doubt that, notwithstanding the condition annexed, and that the daughter would thereby have imposed upon her the burthen of maintaining her children, and so would, in effect, give some pecuniary consideration in return for the legacy, still the legacy would be liable to duty. It may be a question whether, if there were a gift of a legacy out of personalty, on a condition the performance of which would cause something to be returned to the personal estate of the testator, whether there the duty would be payable on the whole legacy, or whether there would be a deduction in respect of the difference. Thus, suppose a testator were to say, I give 500*l.* to *A., he paying 100*l.* to my executor, the legacy would be substantially 400*l.*, and I suppose that amount only would be liable to duty.

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However, it appears to me, that, in all cases where a legacy or an annuity is given out of personalty on a condition, although in one sense that is a purchase of the thing conditioned to be done,—and I do not see where the line is to be drawn between one condition and another, except where something is to return to the personal estate of the testator,—in every case where a testator gives a legacy on a condition, he says in effect, “My object is to have a certain act done; if the party will consent to do it, I will give him a legacy;” and whatever the nature of the act, the testator is really purchasing something from the legatee. Now the 4th section of the Act enacts (his Honour read the clause and proceeded). The word “give,” in this section, is applicable to both branches, and a legacy out of personal estate being on a condition, does not make it less a gift within the meaning of this section; and the same meaning must be applied to the word “give,” both as to personal estate and real estate; therefore, a gift of money out of real estate is not less a gift within the meaning of the Act, because it is upon a condition.

If the testator had given a sum of money charged on real estate to A., the wife of his son, to her separate use, on condition that she should release her right to dower out of her husband’s estate, or on any other condition, that would clearly be liable to legacy duty.

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If in a simple case of money charged upon real estate, and given on a condition, the money is liable to duty, then let one step more be considered : suppose a testator *not to give directly to A., but, as in the very ordinary case, to such one or more of A.'s children as A. shall appoint ; then if A. exercises his power in favour of one of the children, it is clear that that child takes under the will ; that is a settled rule of the law of powers, and in that case, beyond all manner of doubt, the sum of money so appointed would be liable to legacy duty ; and so if the gift were to such one or more of the children, &c., on condition that such child should do some act, that condition would not vary the case : the gift would still be under the will, and liable to duty.

Now the case before me is exactly the same in principle as the case I have supposed. The testator has created a power in the tenant for life to appoint a jointure to any wife that he may marry, but if he appoints, it is to be on condition that the wife shall release her dower ; whether the dower she is to release, is her dower out of the particular estate devised, or generally, does not appear ; but that is, I think, immaterial. For the reasons that I have already given, I do not see how the condition imposed by the testator, that the party taking should do a given act, varies the case from that of a testator making a direct gift on condition.

Whether the appointment may be exercised by deed or by will,—and whichever way it is actually exercised ; if it is, as I think it is, established that the question turns on the original instrument, the will of the testator ; that the legacy is to be treated as passing under that will,—it is immaterial whether the condition is imposed by the instrument executing the power and pointing out the donee, or by the original will creating the power.

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As to the cases in the Exchequer, the only part of *those cases on which I should be at all disposed to observe, is the passages in which the language of the Court tends to create a doubt, whether if the performance of the condition involved the giving up of property, the legacy duty ought to be paid only on the difference. For the reasons I have given, I should not have thought there was any reasonable doubt on that point ; there may be a doubt whether, if the condition involves the return of property to the estate itself, the full legacy duty should be paid ; and possibly that is the point to which the minds of the learned Judges were adverting. In other respects, those cases appear to me to be simply carrying out a principle to its legitimate consequences ; and if I had much more

doubt about them than I have, I should feel almost bound to follow two decisions so fully considered.

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My decision must therefore be in favour of the Crown, and the duty claimed, of 10*l.* per cent., must be paid.

BIRD v. WEBSTER.

(1 Drewry, 338—343; S. C. 22 L. J. Ch. 483; 1 W. R. 121.)

1853.
Jan. 18.
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A testator set out a schedule of his property, calling it 5,000*l.* He then directed 1,000*l.* to be invested in each child's name, and 1,000*l.* in his wife's; interest to them for their life, and afterwards to their descendants, except his wife's, which was, at his death, to be sold and divided among them, except 200*l.* to M. L.'s child by him. Then followed in the same paper: "The above is increased, by the working up of stock, to 5,500*l.* I wish the same division and appropriation, except that, if any share falls in, it may be added to the others, in case the original holder shall have no children." The testator died, leaving four daughters:

Held, that though by the will alone, the daughters might have taken absolute interests; yet by the will and codicil together, they took interests which, if absolute in the first instance, were defensible.

JOHN BIRD made his will in 1833 as follows: After enumerating the items of his property, amounting to 5,000*l.*, he continued, "In case I die without any other will, I wish Mr. Webster and Mr. John Stacey to ascertain the property, and to invest it in the public funds, 1,000*l.* in each child's name, and 1,000*l.* in my wife's; the interest to be received by them regularly for their life, and afterwards to their descendants, except my wife's, which is at her death to be sold out and divided among them, except 200*l.* to M. L.'s child by me.—Signed, JOHN BIRD." On the same paper was the following codicil: "1834, January 14. The above is increased, by the working up of stock, to about 5,500*l.* I wish the same division and appropriation, except that, as any share falls in, it may be added to the others, in case the original holder shall have no children. N.B.—The property is always meant to descend to lawful children."

The testator died in March, 1834, leaving four daughters and no other children surviving. Administration was taken out by Webster alone. The widow died in 1852.

The petition was by two of the daughters unmarried, and the trustees of the two others, and prayed that it *might be declared that, under the circumstances, each daughter had become (subject to the legacy of 200*l.*) entitled absolutely to one-fourth of the residue, and that the one-fourth might be paid accordingly. There was no issue of either of the testator's daughters.

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Mr. C. Barber and Mr. C. Hall, for the petitioners, cited Attorney-General v. Bright (1), Jordan v. Lowe (2), Wylth v. Blackman (3).

Mr. Freeling, for the administrator, was not called upon.

THE VICE-CHANCELLOR:

This will is very inartificial, though it is not ungrammatically expressed. It seems to have been framed by the testator himself, and to contemplate the probability of his making another will; but I have seldom seen a will so inartificial in which the general intention is more apparent. The two instruments are, it must be presumed, on the same sheet of paper, for the second begins thus: "The above is increased," &c. They appear to have been written at some interval of time, the first being dated June, 1833, the second January, 1834. In the first the testator begins by setting out, in a tabular form, what is intended by him as an account of the then state of his property; and he seems to have considered that his property amounted to 5,000*l*. Then follows a statement of his having some debts, the amount of which appears to have been very small; and then he goes on: "In case I die without any other will, I wish Mr. Webster and Mr. John Stacey to ascertain the *property, and to invest it in the public funds, 1,000*l*. in each child's name, and 1,000*l*. in my wife's." Thus far, there is no gift either of principal or interest: all that is directed is investment. Whether the testator meant that investment to be in the sole name of each child and of the wife, or whether in the names of the children jointly with that of Webster, and of the wife jointly with that of Webster, is immaterial, because it is quite apparent that I cannot draw any inference in favour of the gift of the shares absolutely from the direction to invest, for the reasons which I shall presently mention. The will then proceeds: "The interest to be received by them regularly for their life." The effect of this is to give to each child an interest for life in 1,000*l*., and to the wife an interest in 1,000*l*. for her life. Then comes the expression on which the question in this case turns, "and afterwards to their descendants." Now, if the will stopped there, if there were no more, I should be bound to come to the conclusion contended for by the petitioners; for, where there is a gift to A. for life, remainder to the descendants of A., it is clear that, if real estate, it is an

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(1) 2 Keen, 57; practically overruled by the Court of Appeal in *Ex parte Wynch*, 5 D. M. & G. 188. See

note on next page.—O. A. S.

(2) 63 R. R. 105 (6 Beav. 351).

(3) 1 Ves. Sen. 196.

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estate tail; if personal estate, it gives him the absolute interest (1). But this is not all in this case: the language following is, "Except my wife's, which is at her death to be sold out, and divided among them." So that what the testator says is, the interest of 1,000*l.* is to be enjoyed by each child for life; the interest of 1,000*l.* is to be enjoyed by the wife for life, and afterwards to their descendants; that is, to their descendants respectively, except the wife's; he excludes the wife's 1,000*l.*; that, is at her death to be sold and divided among them. Now, it is, I understand, admitted that "them" does not mean all the persons before mentioned, but means the children, excluding the wife. Then this is to be divided among them, "except 200*l.* to *M. L.'s child by me." He declares, therefore, that out of the 1,000*l.* which on his widow's death is divisible, a sum of 200*l.* is to go to his child by M. L., and the remainder of the 1,000*l.* to his four daughters.

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If the will stopped even there, I do not know how I could avoid the conclusion contended for by the petitioners, that, as to the other sums of 1,000*l.* each to the children, it would be an absolute gift to each child.

The subsequent instrument, however, which I may term a codicil, gives the testator's interpretation of what he meant to be the effect of his gifts. Having in his will adverted to the fact that his property amounted to 5,000*l.*, which, if divided into fifths, gives 1,000*l.* to each, that is, 1,000*l.* to each child, and 1,000*l.* to his wife; he now, in his codicil, adverts to the fact that he has increased his property; he says, "The above is increased, by the working up of stock, to about 5,500*l.* I wish the same division and appropriation." Now, if the codicil stopped there, the effect would be that, instead of 5,000*l.*, 5,500*l.* would be divisible in fifths; but then, in the language immediately following, the testator gives his own interpretation. He says, "Except that, as any share falls in, it may be added to the others, in case the original holder shall have no children." Now, here he introduces a variation in the division. What is the meaning of the expression, "As any share falls in, it may be added," &c., &c.? I think the testator clearly intended by it that, upon the death of either of the persons to whom life interests were given, that person's share should be added to the other shares, in case the original holder should have

(1) As to this, however, see *Knight v. Ellis*, 2 Br. C. C. 569, which was not cited in this case; but was followed

in the later case of *Ex parte Wynd* (1854) 5 D. M. & G. 188, where this case was cited.—O. A. S.

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no children. I think the interpretation to be put on the words "original holder" is, that it does not mean any person holding, whether as original donee, or as a descendant of *a donee, but only the first holder; then, on the death of any one of the daughters, the first holders, in case that daughter should have no children, the share of which that daughter enjoyed the interest, was to be added to the other shares, and to go and be enjoyed in the same manner as the other shares.

The testator then adds the N.B. Now, I agree with *Mr. Barber*, that in the N.B. the word "lawful" is the emphatic word. The testator, bearing, in mind that he had a natural child, might contemplate, while he was making a provision for that natural child, that when making a provision for children generally, he might be supposed to intend to include natural children, and he might wish to guard against that natural inference by expressly excluding any but lawful children. But in both instruments he uses the word "children." If I were obliged to decide the question, I think it probable that I should come to the conclusion, that in this will the word "children" meant to include descendants; but it is unnecessary for me to decide that point, for I think it impossible to decide that the daughters are at present entitled to more than the income for their lives. The testator has said, "that as any share falls in," which I construe as meaning, as any daughter dies, her share shall go over in case she shall have no children. Whether that means, in case she shall never have children, or whether it means, in case at the time of her death she shall have no children, or whether "children" means children only, or descendants, it is not necessary to decide. In either case, if at her death there shall not be the persons described in the passage referred to, her share is to go over. So that if the interpretation contended for by the petitioners is right, and that she has an absolute interest, it would still *be liable to be defeated, until the events pointed out shall have happened, which cannot be ascertained till the death. If the interpretation contended for by the petitioners is the right one, the question does not yet arise, whether on the death of any one of the daughters, her share would go to her children or to her descendants; the only question at present is, whether in the event of there being no child, her share would not go over. I think it clear that it would, and that, even if the shares of the daughters are absolute interests, they are liable to be defeated. It appears to me that at present all that can be decided is, that the daughters do

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not take absolute and indefeasible interests, but are only entitled to take the income for their lives.

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The Court was pressed to decide, whether, in the event of there being children, children only, or descendants would take ; but declined, in the absence of parties who might claim in the character of descendants, to decide that point.

WRIGHT v. VERNON (1).

(1 Drewry, 344—353.)

1853.
Jan. 20, 21.

KINDRESLEY,
V.-C.
[344]

A bill alleged the plaintiff to be entitled, under wills which it set out, as tenant in tail ; it alleged that the defendants claimed under the same will as tenants in fee. The question as raised by the pleading was one of pure construction of these wills. The bill also alleged the plaintiff's pedigree as tenant in tail. The answer ignored the pedigree, but admitted the possession of documents tending to evidence that pedigree: Held, that the plaintiff was entitled to production of them.

A bill alleged that A. left B., his niece, and C., his great-nephew, his co-heirs, who thereupon became the right heirs and issue in tail of D. : Held, that this was a sufficiently certain allegation of the title of B. and C., as such co-heirs and issue in tail claiming through A.

THE bill in this case was filed by William Wright against Leicester Vernon and Emily his wife, and others. It alleged that Sir Thomas Samwell, being seized of certain real estates, by his will, dated 1st November, 1778 [devised the same] to the use of his son, Thomas Samwell, for life, remainder to his first and other sons in tail male ; and, after certain limitations, to Thomas Fuller Drought for life, remainder to his sons successively in tail male, remainder to his (the testator's) right heirs for ever.

All the intermediate limitations became exhausted, and Thomas F. Drought became entitled for life, and enjoyed the estates, and died in 1843, without issue ; and thereupon the right heirs of Sir T. Samwell became entitled.

The bill then stated a series of facts, by which it appears that, in 1808, Thomas F. Drought and Frances Ann Langham and Phillis Langham were the co-heirs and co-parceners of the testator, Sir T. Samwell. In 1827, Frances A. Langham made her will, which, after divers limitations, contained an ultimate limitation to the right heirs of Sir T. Samwell (the father of the testator) by Mary his second wife.

Phillis Langham made her will at the same time and it contained the same ultimate limitation.

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(1) *Lyell v. Kennedy* (1884) 27 Ch. Div. 1, 51 L. J. Ch. 937, 50 L. T. 730

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The bill then alleged facts, showing that, in 1849, all the limitations under the wills of these two ladies, preceding the ultimate limitations, had failed; and then followed this passage: "That the said limitation contained in the said wills to the right heirs of Sir Thomas Samwell, the father, created, as plaintiff is advised, according to the true construction of the said wills, an estate tail to the issue of the said Sir Thomas Samwell, the father, by Mary, his second wife, and descendible as if such estate tail had descended from the said Sir Thomas Samwell to the issue of his second marriage."

The bill then proceeded to state the pedigree of the person through whom the plaintiff claimed; and, after stating various links of it, stated that one Atherton Watson died in May, 1851, leaving his grand-nephew, W. L. Woodford (one of the defendants) and his niece Charlotte Henrietta Wright, the plaintiff's late wife, his co-heirs and co-parceners, who then became the right heirs and issue in tail and co-parceners of Sir Thomas Samwell, the father, by his wife Mary; and that the estates created by the wills of F. A. Langham and Phillis Langham to the right heirs and issue in tail of Sir Thomas Samwell, the father, by his wife Mary, vested in said W. L. Woodford and Charlotte Henrietta Wright accordingly; and that Charlotte Henrietta Wright, on the death of Atherton Watson, became entitled to an estate tail in possession of and in one half part of the two undivided third parts of Sir Thomas Samwell the testator's estate.

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The bill then stated a disentailing deed, by which, in *1851, C. H. Wright barred her estate tail, and resettled it upon limitations, under which, in the events which happened on the death of C. H. Wright, which took place in November, 1851, the plaintiff, her husband, took her one-third part of the estates in fee.

The bill then went on to state that Leicester Vernon and his wife, and certain others of the defendants, set up an adverse claim to the estates, and pretended that on the true construction of the wills of F. A. Langham and P. Langham, an estate in fee simple was devised to the person who answered the description of the right heir of Sir T. Samwell at the respective times of the deaths of F. A. Langham and P. Langham, in remainder expectant upon the preceding limitations contained in their wills; and that the defendants alleged that one Thomas S. W. Samwell was the person who at those times answered that description, and that he therefore then took an estate in fee.

The bill then alleged that the defendants claimed under the will of the wife of Thomas S. W. Samwell, to whom he had devised his estates in fee; that the defendants and W. Vernon and his wife, or their trustees, had been and were in possession of the estates claimed by the plaintiff.

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The bill then stated that, in 1851, the plaintiff and C. H. Wright, his wife then living, brought ejectment against certain of the defendants, to recover such estates; but that such action of ejectment could not be prosecuted, because the legal estate was outstanding in mortgagees; and then after various charges, there was the usual charge of books and papers.

The prayer was, to have it declared that C. H. Wright became, on the death of Atherton Watson, tenant in tail of one-third part of the estates of the testator Sir T. Samwell, and that, on her death, by the disentailing deed, the plaintiff became entitled in fee, and that he might be let into possession.

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The answers of L. Vernon and his wife admitted the facts stated in the bill, down to the exhaustion of the limitations in the wills of F. A. Langham and P. Langham, preceding the ultimate limitations to the right heirs of Sir T. Samwell, the father, by his wife Mary; and submitted that the said limitations constituted an estate in fee simple in the person who answered the description therein contained, and denied that the limitations created an estate tail. As to the pedigree of W. L. Woodford and C. H. Wright, the answers ignored whether Atherton Watson did leave them his grand-nephew and niece, or whether or not his co-heirs and coparceners; and throughout it denied the title of C. H. Wright as tenant in tail.

The answers admitted the possession of documents set forth in a schedule, relating to the real estates mentioned in the bill.

A motion was now made for the production of the documents contained in the schedule.

The schedule referred to documents of various kinds; and, among others, to copies of a supposed pedigree (including the pedigree of the plaintiff as well as of the defendants), prepared for the use of counsel for the defendants in previous proceedings taken by the plaintiff and his deceased wife; fifty extracts from parish registers *obtained by the defendant L. Vernon for his defence to the action of ejectment; and a pedigree obtained from the Heralds' College, and paid for by the defendant L. Vernon.

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Mr. Malins and Mr. Smythe, for the plaintiff:

The substantial question is, whether the limitations in the wills of F. A. Langham and P. Langham to the right heirs of Sir T. Samwell by his wife Mary, gave an estate tail or an estate in fee. We say it gave an estate tail; that point, however, cannot now be argued. But the defendants also say, we do not show our pedigree as heirs of the bodies of Sir T. Samwell and Mary his wife, and put us to proof of that. They have in their possession documents which evidence our pedigree; and they are bound to produce them. They do not deny the links of our pedigree, they only ignore them; but they admit the documents relate to the estates in question in the bill.

Some discussion took place as to documents, which, it was said, were privileged; and on the plaintiff's counsel concluding their opening of the case, the VICE-CHANCELLOR directed the counsel for the defendants to confine their argument to the question of producing the documents evidencing the pedigree, and the copies of the wills of Sir T. Samwell and of F. A. Langham and P. Langham; the latter point, however, was given up by the defendants.

Mr. Campbell and Mr. Bagshawe, for the defendants L. Vernon and wife:

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The answer ignores the title of the plaintiff; it could *do no more; it could not absolutely deny the pedigree alleged by the plaintiff; for how could the defendants know who were the ancestors of the person through whom the plaintiff claimed? What is really asked here by the motion is information relating to, and divulging our title, which, if the Court should decide the construction in one way, viz. that it is an estate in fee, the plaintiff has no right at all; information as to a title, to which in that case he would be a perfect stranger, and which, though he might use it for the benefit of a third person and for our detriment, he never could use for his own benefit. The bill has been stated by the counsel's plaintiff to be, and is, a bill for equitable ejectment. If the plaintiff were bringing ejectment at law, he must rest on his own proofs; it is clear he could not ask for the defendant's documents. Why, then, should he now do so?

A plaintiff in equity, to be entitled to see the defendant's documents on the ground of their evidencing the plaintiff's title,

must show, at least, a *prima facie* title. Here he does not do that; the title depending on the construction, and being therefore on the face of the bill uncertain. If the plaintiff is not tenant in tail,—and whether he is or not is doubtful on the allegations of the bill itself, as founded on the documents set out,—he has no interest in the defendant's documents; and a plaintiff in equity must show an interest in the documents, to be entitled to their production. [They cited *Burbidge v. Robinson* (1), *Gethin v. Gale* (2), *Adams v. Fisher* (3), *Storey v. Lennox* (4).]

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Mr. Russell and *Mr. Renshaw*, for the trustees of *Mr. and Mrs. Vernon*.

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Mr. Malins, in reply.

THE VICE-CHANCELLOR:

Some of the documents of which the plaintiff seeks to have production, are deeds relating to the estates in question; and the ground on which he seeks production is, that they show the particulars of the parcels. If that were necessary for the plaintiff to assist him in the contest, he would have a right to the production, but it will not assist him at all: the question at issue does not in the least degree depend upon the amount or particulars of the parcels; and as to those documents, therefore, the plaintiff is not entitled to production.

Then there are copies of a supposed pedigree, made for the use of the counsel for the defendants, to instruct counsel in particular proceedings; not as admission of pedigree, but made merely for the purpose of informing counsel what was the representation of the defendants as to their own and the plaintiff's pedigree. The plaintiff is not entitled to these.

Then there are fifty extracts from parish registers, obtained by the defendants, to enable them to conduct their defence in the action of ejectment, an action in which the plaintiff was the very plaintiff in this suit, desiring to try the question whether, on the construction of the wills of the two ladies named, the estates created by them were estates tail, or estates in fee; the plaintiff says he is entitled if those estates were estates tail: the question is a legal question; but by reason of the legal estate being outstanding in mortgagees, it could not be tried in the action at law.

(1) 86 R. R. 90 (2 Mac. & G. 244).

(3) 45 R. R. 328 (3 My. & Cr. 526).

(2) Cited in Amb. 354.

(4) 43 R. R. 248 (1 My. & Cr. 525).

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The defendants to that action *provided for their defence in it, extracts from registers, for the purpose of showing their pedigree, which is, in a great measure, the same as the plaintiff's. The ejectment is now at an end or suspended, and those documents remain in the possession of the defendant, and the plaintiff asks that they should be produced. Why should they not? Why is the circumstance that they were procured for the action at law, a reason why they should not now be produced? If they had been procured for this very litigation, they must, I think, be produced. In *Storey v. Lennox* the contest was, whether a policy of insurance was valid, and whether the office was bound to pay: the office resisted payment on the ground of circumstances affecting the insurer. Lennox, who was the party interested in the policy, and claiming payment, had had personal communications with various individuals, for the purpose of obtaining from them information relating to the insurers; that was information obtained from strangers, and for the purpose of the contest; yet he was obliged to produce the documents. (His Honour referred to the judgment in that case, and proceeded.) Here the documents in question are not confidential, but merely extracts from parish registers, and the defendant must produce them.

Then, as to the pedigree obtained from the Heralds' College, the only objection made to that is, that it was obtained at the defendant's expense. That is not a valid objection; however the defendant obtained it, he must show it.

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Now it has been argued generally for the defendant, that the plaintiff ought not to be allowed inspection of documents, until he has established by a decree or order of this Court, or by the decision of a court of law, that he *is entitled to the estate in controversy. The Court, will have, however, at the hearing to determine certain questions, the principal one of which is a question purely of the construction of wills, as to the terms of which there is no dispute: the plaintiff says, if the construction is one way, I am entitled as the heir in tail claiming through a certain descent; if the other way, the defendant is entitled; and it is contended, that before the plaintiff has a right to the discovery of the documents possessed by the defendant, to assist him in proving his descent, he must first have that which he cannot have till he has made out his descent—the determination of the question of construction. He cannot try his right at law: he is therefore obliged to come here, and his first difficulty is to make out that he is what he represents himself to be,

the descendant of A. B. I am of opinion that as to any documents in the defendant's custody (not being specially protected) tending to assist the plaintiff in making out the facts requisite to prove his descent, the plaintiff would have a right to inspect them. But then it is said that the plaintiff has not alleged his pedigree with sufficient certainty. (His Honour referred to the passage of the bill in which the death of Atherton Watson, leaving his grand-nephew and niece, is stated, and proceeded.) If the plaintiff had made a mere loose statement, as that A. left B. his heir, that would not be reasonable certainty of allegation; or if he had said A. left B. his cousin and heir; that, from the generality of the word "cousin," would not be a sufficiently certain allegation. But what he has done is to allege that Atherton left one his niece, and the other his grand-nephew; and I think those terms designate the relationship with sufficient certainty.

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On the whole, I think there are a great many of the *documents which the plaintiff is not entitled to see; but he is entitled to see the fifty certificates and the pedigree obtained from the Heralds' College.

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(1 Drewry, 353—370; S. C. 22 L. J. Ch. 457; 17 Jur. 219; 1 W. R. 109; 20 L. T. O. S. 193.)

The first edition of a work of compilation was published before the Copyright Act, 1842 (5 & 6 Vict. c. 45); several editions of it were published after this Act, and not registered: Held, that as to so much of the matter contained in the original edition, as was contained in the subsequent ones, the owner might sue, although those subsequent editions were not registered; but as to the new matter, the subsequent editions were books which ought to be registered, and the owner could not sue for infringement on that point.

If a foreigner translates an English work, and then an Englishman retranslates that foreign work into English, that is an infringement of the original copyright.

Grounds on which fairness or unfairness in the use of a previous work is to be determined.

THIS was a bill by John Murray against David Bogue, to restrain piracy of the plaintiff's book, called "A Handbook for Travellers in Switzerland," &c.

The plaintiff's bill, and the affidavit in support of it, alleged that in and previously to the year 1838, the plaintiff wrote and composed a book under the title of "A Handbook for Travellers in

(1) Cited, *Hanstaengl v. Empire Palace* [1894] 3 Ch. 109, 63 L. J. Ch. 681, 70 L. T. 854, C. A. (see [1895] A. C. 20).

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13, 14.

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Switzerland and the Alps of Savoy and Piedmont," which work was thereafter, for the sake of brevity, called or referred to as the "Handbook," and the said "Handbook" was written and composed by the plaintiff, principally from the personal observation and experience of the plaintiff, obtained in the course of extensive and carefully performed journeys in and through the aforesaid countries which had been then recently made by the plaintiff; and at the same time the plaintiff, by the accounts of other travellers and authors, and comparing *their accounts with the result of his own observation, was enabled to add to the said work much useful information; and in the said work the plaintiff inserted a few communications made to him by personal friends, and which communications were written and sent to the plaintiff, expressly to be made use of by the plaintiff; and that previous to such publication by the plaintiff, there existed no other work on the same plan, or containing so much and such useful information. That the plaintiff's book, so written and composed, was first published in the month of September, 1838, and the said work had ever since enjoyed an extensive sale; and five large editions of the said work had since been published, and the second edition was printed and published in the month of July, in the year 1842; and the third edition of the said work was printed and published in the month of June, in the year 1846; and the fourth edition of the said work was printed in the month of September, in the year 1851; and the fifth edition was printed and published in the month of September, in the year 1852, and the same was, at the date of the bill, in course of sale.

That the said work of the plaintiff was one of a series of handbooks or travellers' guides, written and composed and published by the plaintiff, which were all printed in a uniform manner, and were bound or boarded in red cloth with gilt lettering on the outside of the upper cover of the said book; and plaintiff's book had, from the colour of the binding, been generally known amongst foreigners as "the red book."

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That the defendant David Bogue some time ago announced a series of guide books under the title of "Bogue's Guides for Travellers," of which he had already published two parts or volumes; and the first *of such parts or volumes, with the particular title of "Belgium and the Rhine," was first published in or about the month of July, 1852; and the second of such parts or volumes, with the particular title of "Switzerland and Savoy," was first published in or about the month of August, 1852, with the

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particular title of "Switzerland" only, but the said title was afterwards altered to "Switzerland and Savoy," as the plaintiff believed, by way of closer imitation of the plaintiff's work; and other parts or volumes of the said series of books, called "Bogue's Guides for Travellers," were advertised and announced for publication; and such parts or volumes were bound in red cloth, with gilt lettering.

That parts of the said work published by the defendant, called "Switzerland and Savoy," had been pirated and copied from the "Handbook," and in many respects an unfair use had in the said work called "Switzerland and Savoy," published by the defendant, been made of the "Handbook;" and in particular, in the said work called "Switzerland and Savoy," the design and plan of the "Handbook" had been followed to a very considerable extent; and the extent and nature of the piracy which had been committed would more fully appear upon inspection and comparison of the respective works. The plaintiff in particular referred to the instances thereafter mentioned, which, he alleged, afforded some evidence of the piratical use which had been made of the "Handbook," in some of which instances errors which were contained in the edition of the said "Handbook," previous to the fifth edition thereof, and which errors had accidentally crept into the same work, had been copied into and were also contained in the said work, called "Switzerland and Savoy;" and about thirty-two *routes, in the whole, were taken from the plaintiff's work, and piratically used in the said work, called "Switzerland and Savoy."

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The plaintiff then went on to point out certain specific passages in his own book, which he alleged were copied by the defendant; and he relied in particular on similarity in errors, and on the same objects being noticed in particular routes, to show piracy.

The substance of the evidence on behalf of the defendant was, that being desirous of meeting the want of the public for a handbook of convenient size and moderate price, he employed one Mr. Hunt to write and compile for him a series of guidebooks, one of which was published in July, 1852, and was the book alleged to be the piracy of the plaintiff; that, for the express purpose of avoiding any interference with the plaintiff, he particularly charged Mr. Hunt not to make any use of Murray's book, but to take his materials from other, and, as far as practicable, from original sources. Mr. Hunt's affidavits corroborated the statement of the defendant as to the instructions given to him, and stated that he accordingly engaged Mr. Thomas Walker, a journalist, to write and

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compile such work for the said defendant, and that he communicated to him the directions and instructions he had so received from the said defendant, and at the same time furnished him, the said Thomas Walker, with his (Mr. Hunt's) own manuscript notes made by him during two visits he had paid to Switzerland and Savoy.

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These manuscript notes of Mr. Hunt were called for by the plaintiff's counsel, but were not forthcoming; and at a subsequent stage of the proceedings, on the *14th December, an affidavit was produced by Mr. Hunt and Mr. Walker to explain what had become of these notes (1).

Mr. Walker made also an affidavit in which he stated that he did compile the defendant's book, and that the sources of information from which he so compiled it were the said manuscript notes of Mr. Hunt, the manuscript notes of another gentleman of the name of Lloyd, several foreign books which he specifically enumerated, a book published by an American, the Rev. Dr. Cheever, together with many other and local publications: and then there was this passage: "I most distinctly deny that I knowingly or willingly extracted or quoted from the said book so published as aforesaid by the said plaintiff, any part or portion whatever." He then met several of the specific allegations of piracy, by stating as to some of them that they were taken from Dr. Cheever's book; as to others, that they were taken from manuscript notes, but without saying whose notes; and as to others, that they were taken from local guidebooks, but without identifying them. Some of these local guidebooks were, and others were not, produced; but none of the manuscript notes were forthcoming. What had become of them is stated in the affidavits filed on the 14th December. Many parts of the defendant's book were confessedly translated from a German book, by one Bædeker, which was founded on Murray's.

A preliminary objection was suggested by *Mr. Craig*, for the defendant, that the plaintiff had not registered his book; but the COURT being of opinion that the whole case should be gone into,

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Mr. Bacon and *Mr. Renshaw*, for the plaintiff, proceeded *upon the merits, and went at length into a comparison of corresponding passages in the two books. [They cited *Lewis v. Fullarton* (2), *Murman v. Tegg* (3), *Bramwell v. Halcombe* (4), *Campbell v. Scott* (5), and other cases.]

(1) See next page.

(2) 50 R. R. 84 (2 Beav. 6).

(3) 26 R. R. 122 (2 Russ. 385).

(4) 45 R. R. 378 (3 My. & Cr. 737).

(5) 54 R. R. 321 (11 Sim. 31).

Mr. Craig, for the defendant :

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First, the plaintiff has not sufficiently registered his book. (He referred to the 24th sect. of the 5 & 6 Vict. c. 45.) * * As to the first edition, it was registered in the manner then prescribed by law (1), and in the name of John Murray deceased, the *father of the plaintiff, and not in the plaintiff's name. * * The copyright of the book is in the representatives of J. Murray deceased, and it is not alleged that the present plaintiff is such representative ; so that he has no title. * * *

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2ndly, upon the merits ; no injury can be done, unless the edition of 1852 is copied ; for that is the only one having a sale, and it is not alleged that there is infringement of that edition. In a case of this kind, to justify interference, the imitation must be servile ; here it is not : *Cary v. Longman* (2), *Cary v. Kearsley* (3). [He cited also *Sweet v. Cater* (4) and *Spottiswoode v. Clark* (5).]

Mr. Reilly with him :

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* * In the 24th section of the Copyright Act, the word " book " includes new editions. The second section also shows that. As to the portions of the plaintiff's book being communications, he shows no title at all. The copyright of those is still in the authors, for the plaintiff has not shown any assignment to him, nor any contract or payment within the Act : *Richardson v. Gilbert* (6), *Bishop of Hereford v. Griffin* (7).

The contributors to the plaintiff's book have merely given him a licence to print, not a copyright. Besides, it is not shown that the first edition is the same as the third. If it is, then the title would be under the first, and that is the copyright of the plaintiff's father ; if the third edition is a materially different book, it ought to be registered.

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(The VICE-CHANCELLOR having, in the course of the argument, asked for explanation as to the non-production of any of the MS. notes, from which it was alleged that the defendant's information was taken, the affidavits of Mr. Hunt, and Mr. Walker, and of the printer, were tendered at the conclusion of the defendant's argument.)

The effect of these affidavits was [that the notes had been

(1) See 54 Geo. III. c. 156.

(2) 6 R. R. 285 (1 East, 358).

(3) 6 R. R. 846 (4 Esp. 168).

(4) 54 R. R. 439 (11 Sim. 572).

(5) 78 R. R. 63 (2 Ph. 154).

(6) 89 R. R. 105 (1 Sim. N. S. 336).

(7) 80 R. R. 49 (16 Sim. 190).

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destroyed as to part by Mr. Walker and as to the remainder by the printer, so soon as they had been done with, according to their custom].

[362] *Mr. Bacon*, in reply :

As to the communications, there is no copyright in them in the authors. They belong to the plaintiff. [On this point he cited *Rundell v. Murray* (1).] It is admitted that much is taken by the defendant from Dr. Cheever's book, but Cheever's book on the face of it is copied from Murray's, and it is admitted that much is taken from Bædeker, which is a free translation from Murray's.

On the 13th January, the VICE-CHANCELLOR delivered the following judgment :

This is a motion for an injunction to restrain the defendant Bogue from selling, &c. (His Honour stated the terms of the notice of motion.) The defendant insists, firstly, that, supposing his work is borrowed from the plaintiff's, the plaintiff is not entitled to sue in respect of the infringement, by reason of the want of due registration of his book.

Secondly, that if that objection is not to prevail, the defendant's work is in fact no piracy of the plaintiff's.

As to the first question, that is, the question of registration, it is necessary that I should take that into consideration first.

Previously to the recent Copyright Act, the 5 & 6 Vict. c. 45, it was not necessary, to entitle a plaintiff, claiming as owner of copyright, to sue, that his work should be registered at Stationers' Hall. Although he *was bound to register for certain purposes, it has been decided, that where there was no registration, the party entitled to copyright might protect his right by action or suit. The 5 & 6 Vict. c. 45, made an alteration in the law in that respect. The 24th section enacts, that no proprietor of copyright in any book which shall be first published after the passing of the Act, shall maintain any action or suit, at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company, of such book, pursuant to the Act. So that, as to books first published after the Act, although the author has copyright in them, he cannot sue, either at law or in equity, to protect himself against infringement of the Act, unless

he has registered his book at Stationers' Hall, pursuant to the statute. That, however, applies only to books first published after the Act; it does not affect any book published before.

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Now the Act passed on the 1st July, 1842. The first edition of the plaintiff's book was published in 1838, and according to the bill, and affidavits in support of it, the 2nd edition was published in July, 1842. I think I am bound to assume, the Act having passed, as I mentioned, on the 1st July, 1842, that the second edition was published after the passing of the Act. If it were of importance to show that the second edition was published before the 1st of July, the plaintiff ought to have shown that to be so; he has not attempted it, and I must assume therefore that it was published after the Act.

The third was published in 1846; the fourth in 1851; and the fifth in 1852.

What, then, was the effect of the Act as to the several editions of the plaintiff's book published after it had passed?

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The plaintiff's book, except so far as it was registered before the Act, has not been registered at all.

Now, with reference to the first edition, the law as it existed before the 5 & 6 Vict. did not require registration as a condition to the title to sue. The Act of Victoria made no alteration in the plaintiff's rights in respect of that first edition, except in so far as it repeals all prior Acts; and if that were all, if it had stopped there, it might be a question whether there would be copyright now in any book published before the Act of Victoria, because it has been decided that there is no common-law copyright; the statute, however, goes on to re-enact copyright, giving to the author a longer enjoyment of it. But as to the obligation to register, the statute leaves that matter just where it was, in reference to existing works, and confines the new obligation to works first published after the Act.

If, then, Mr. Murray had published his first edition in 1838, and published no subsequent editions, and there were an infringement of that edition, he would clearly have a right now to sue at law, or in equity, to protect himself. Publishing another edition of his work, after the passing of the Act, does not affect his copyright in the first edition; but if he prints, as he has done, a second edition after the Act, not being a mere reprint of the first edition, but containing considerable and material alterations and additions, *quoad* those, it is a new work; and in order to enable him to sue

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in respect of any infringement of his rights in those portions of the second edition which are new, if those only were infringed he *must, before he can sue, register the book in which they are contained. Now Mr. Murray, in the preface to his second and subsequent editions repeats the preface to the first, and adds this note: "The present edition has been very carefully revised and corrected as far as possible, down to the present time; some new notes have been added, and others have been re-written." One can conceive cases in which the alterations to a second edition may be of very trifling extent; but one can also conceive cases in which a second edition may contain five or ten times the matter contained in the original. The extent, however, of the alterations is immaterial; to whatever extent a new edition is made a new work, the new part cannot be protected by suit until registration; but that effect of the Act has no operation as to the old parts; as to them the copyright is left where it was. If, then, Mr. Bogue has taken that which was contained in the first edition of Mr. Murray's work, Mr. Murray may protect his copyright so far, because that book was published before the Act; and this brings me to this point, that although the defendant's argument cannot be supported to the extent to which he presses it, viz., that because Mr. Murray has not registered his subsequent edition, he can have no relief at all, it must be supported to this not inconsiderable extent, that I must discard all reference to any edition except the first. I must confine myself to the edition of 1838, and only look to what is contained in that; and I now come to the consideration how far Mr. Bogue's book is a piracy of that first edition. Now I must say, that beyond all question, in my opinion, to some extent Mr. Bogue has used Mr. Murray's book. Some instances are stated in the bill, and others were stated at the Bar, to show that Mr. Bogue has copied the plaintiff's errors, which [*367] *is the ordinary and familiar mode of trying the fact whether the defendant has used the plaintiff's book.

Now, the use of showing the same errors in both is, that where the defendant says he has got his information, not from the plaintiff, but from other sources, if the evidence is unsatisfactory on the question, whether the defendant did use the plaintiff's work or not, to show the same errors in the subsequent work that are contained in the original, is a strong argument to show copying. There are a great many instances of alleged imitations which have been referred to, which appear to me to be of small weight; and there are some which apply to passages and editions subsequent to the first, which

I must, for the reason I have given, reject. But there are many passages in which the defendant has used the plaintiff's work, not probably actually making use of the first, nor even of that of 1846, but most probably the latest; that, however, is not material; and I am satisfied that, to some extent, the defendant has made use of the plaintiff's book. (The VICE-CHANCELLOR referred to several passages confessedly taken, or abridged, from Bædeker's work, in which particular expressions were used not to be found in that book, but found in Murray's; and observed that there were many other passages, showing that, to some extent, the plaintiff's book had been used, and that that was the only use that could be made of similarity in errors. He then continued:)

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The defendant's book is in many parts a translation of, or rather an abridgment from Bædeker; and this made it necessary to examine Bædeker, with both the plaintiff's and defendant's works; and I think this view must be taken. If Bædeker's were a translation of *Murray's into German, and then the defendant had retranslated Bædeker's into English, even if he did not know that Bædeker's was taken from Murray, I could not allow the plaintiff's book to be thus indirectly pirated. I put that as an extreme case; but, in that view, I consider it necessary to ascertain how far Bædeker's book, if published as an English work, would have been a piracy of the plaintiff's. Now, I find that Bædeker, in his preface, avows distinctly the advantage he has derived from Murray's book. (His Honour referred to passages in the preface referring to Mr. Murray's book, and stating that he had made it his groundwork.) He professes to have compiled much from personal observation. I have examined, not the whole of the book, but very numerous parts of it, and I am satisfied that, though the general plan and scheme are Mr. Murray's, Bædeker's representation is a correct one, that Murray's is the frame, but he has filled it up in his own way; that, taking Murray's for the groundwork, Bædeker's is substantially original.

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Whether, if Bædeker's had been an English book, he had made an unfair use of Murray's, might probably be a question; but that is not necessary for me to decide.

Now, comparing the defendant's work with Bædeker's, I have found that in many parts it is a literal translation of it; he has freely translated from Bædeker, and in many parts it is in fact a servile copy; in some parts, also, he has freely taken Dr. Cheever's work. Now, Dr. Cheever's book was, no doubt, composed by a

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person travelling with Murray's book in his hand; and some use he has made of it; but it cannot be pretended that Dr. Cheever's is a piracy of Murray's; in fact, Dr. Cheever's *work was published in England, but no steps have ever been taken by Murray against it.

Now, I have felt great difficulty in coming to a conclusion whether, taking Mr. Bogue's book to have been written with a certain use of Murray's, and with a free use of Bædeker's and Cheever's, at the same time with much taken from other works, the use of the plaintiff's materials and the benefit derived from his work by the defendant, directly or indirectly, amount to such an extraction from it, as comes up to an extraction of the vital part; whether it comes up to an unfair use, or is only a fair use of it.

The difficulty arises partly out of the nature of the subject; two guide books referring to the same tract of country must of necessity have much that is similar: the same objects of interest are likely to be noticed by all who visit a particular place.

With regard to the general scheme of the two books, they are quite different; the defendant's plan is much more limited than either Murray's or Bædeker's. He sets out, for instance, from Basle, and, traversing a given route, brings you back to Basle; then he takes another route, starting from Basle, and again brings you back. This is quite different from the scheme of routes in both Murray and Bædeker. As to the similarity between the same routes, as between any two descriptions of the same route, there must be similarity; the same important or material places must be described; but, even on that point the defendant differs from the plaintiff, mentioning places not mentioned by Murray or Bædeker, and omitting places mentioned by them.

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On the whole, my conclusion is, that I cannot say that the defendant in his work makes an unfair use of the plaintiff's. I am not absolutely satisfied that the use made of it might not by another Judge be looked at in a different light; but I cannot satisfy my mind that there is that unfair use which would justify me in restraining the publication of the defendant's work. The injunction must therefore be refused. The costs to be costs in the cause.

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(1 Drewry, 371—399.)

A renewable leasehold for lives was vested in A. in trust for B. for life, with remainders in the events that happened to C. and his heirs. Afterwards, on the marriage of B., a settlement was made (on the construction of which it was doubtful whether the leasehold passed), on B. for life, remainder to the sons of that marriage in tail; under which D. would be entitled. The lease being still subsisting in A., B. took a renewal in his own name without noticing the trust; and after the death of B., D. entered and took a renewal in his own name, and the property continued to be enjoyed by him and those claiming under him, for a time much beyond the period of limitation, and more than twenty years before the commencement of a suit by those claiming under C. D., on his marriage, assigned the leasehold to the trustees of his marriage settlement, and they were enjoyed accordingly until the filing of the bill. The transactions relating to the deed, on the construction of which the doubts arose, took place sixty-two years before the filing of the bill, which was not filed till after all the persons who could have explained those transactions were dead; there was much ground for believing that the parties had intended the deed to include the leaseholds:

Held, firstly, that assuming the possession of D., and those claiming under him, to have been originally wrongful, he and they were not express trustees within the 23th section of the Statute of Limitations, and might set up the statute as a bar. Secondly, that even if there had been an express trust, those claiming under the settlement by D. could, as purchasers, set up the statute.

In this case a bill was filed by Henry Petre, claiming through George Petre the son of George William Petre, who was the second son of the ninth Lord Petre by his first marriage.

The ninth Lord Petre was twice married; and on his second marriage with his then intended wife, Lady Juliana Barbara Howard, he made a settlement by deeds of lease and release of the 14th and 15th January, 1788.

The parties to the latter deed were Robert Edward the ninth Lord Petre, of the first part; George William Petre his only younger son, of the second part; Juliana Barbara Howard, the intended wife, of the third part; the guardians of the lady, of the fourth part; Lord Stourton and John Courtenay Throckmorton (afterwards Sir J. C. Throckmorton), of the fifth part; and the Duke of Norfolk, Sir Francis Molyneux, and Bernard Edward Howard, of the sixth part. It recited, that the manors, messuages, lands, tenements, and hereditaments, thereby granted and released, or intended so to be, were and stood limited or settled to the use of the said Robert Edward, Lord Petre, and his assigns for the term of his life; and

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Nov. 8.

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Jan. 25.

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(1) *Willis v. Earl Howe* [1893] 2 Ch. H. L. [1895] A. C. 495, 64 L. J. Ch. 545, 62 L. J. Ch. 690, 69 L. T. 358; 652; *In re McCullum* [1901] 1 Ch. 143, *Thorne v. Heard* [1894] 1 Ch. 599 (in 70 L. J. Ch. 206, 83 L. T. 717, C. A.

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from and immediately after his decease, to the use of the said George William Petre, his heirs and assigns for ever; and upon the treaty for the said intended marriage, it was agreed by and on the part of the said Juliana Barbara Howard, that the sum of 5,500*l.*, to which the said Juliana Barbara Howard was entitled, and also her shares of the sum of 4,000*l.*, and the sum of 3,000*l.* New South Sea Annuities, and the interest and dividends to accrue for or in respect of the same, should upon the solemnization of the said marriage become the property of and be payable and transferable to the said Robert Edward, Lord Petre, for his own use and benefit; and in consideration thereof the said Robert Edward, Lord Petre, and George William Petre did agree (among other things) to join and concur in conveying, settling, and assuring the said manors, messuages, lands, tenements, and hereditaments, with the rights, members, and appurtenances thereto belonging, to the uses, upon the trusts, for the intents and purposes, and under and subject to the powers, provisions, declarations, and agreements in and by the said indenture limited, expressed, declared, and contained, of and concerning the same.

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For these considerations, Lord Petre and G. W. Petre conveyed to Lord Stourton and Sir J. C. Throckmorton and their heirs, "all that the manor of Selby, in the West Riding of the county of York, with the rights, members, and appurtenances thereto belonging; and all those messuages, cottages, farms, lands, tenements, and hereditaments, situate, lying, and being within the manor of Selby aforesaid, or within the town or township, precinct or territory of Selby, in the said county of York." And, *inter alia*, all that the right of presentation, patronage, or free disposition of and to the curacy of the parish church of Selby aforesaid, together with all and singular the tithes, both great and small, arising, growing, renewing, or coming, and paid or payable for or in respect of any lands, tenements, or hereditaments within the said manor or the parish of Selby. And also the parts or shares of or to which the Right Honourable Catharine, late Lady Dowager Stourton, deceased, was seised or entitled, at the time of her decease, of and in the great and small tithes yearly issuing, arising, growing, or renewing within the parish of Brayton. And all and singular other the fee simple manors or lordships, or reputed manors or lordships, advowsons, rectories, tithes, rents, messuages, cottages, farms, lands, tenements, and hereditaments, which were devised or directed to be settled by the last will and testament or codicil of Catharine, Lady Dowager

Stourton, or which, upon her decease, descended on the said Robert Edward, Lord Petre, as her heir-at-law, situate, lying, and being, or arising, happening, or growing, increasing or renewing, or to be had, received, taken, or enjoyed, in, within, upon, or out of Selby, Brayton, Burton, Thorp, Thorp-Willoughby, Roxley, Deepdale, Buckley, Cowseley, Hillam, Monck, Frystan, Carlton, Walshford, *alias* Washford, Wilstrop, Lockwith, or elsewhere in the *said county of York, (save and always except the Craven estates), to the use of the Duke of Norfolk, Sir F. Molyneux, and B. E. Howard, for a term of years; subject thereto to the use of the ninth Lord Petre for life; with a limitation to preserve contingent remainders; remainder, subject to a further term, to the first and other sons of the ninth Lord Petre by the said J. B. Howard in tail male, remainder to the ninth Lord Petre in fee.

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The bill prayed that the defendant might be declared to be a trustee for the plaintiff and his heirs and assigns, of the leasehold hereditaments and premises in the parish of Brayton, and might be decreed to convey them to him with consequential directions, and accounts.

The above deed was that on which the principal question arose. The facts and the material parts of the other deeds on which the questions in this case turned, and the principal points argued on both sides, are fully noticed in the judgment.

Mr. Malins, Mr. Glasse, and Mr. Nalder, were for the plaintiff. They cited *Commissioners, &c. v. Wybrant* (1), *Blair v. Nugent* (2), *Gough v. Bult* (3), *Young v. Waterpark* (4).

Mr. Rolt, Mr. J. Bailey, and Mr. Messiter, for the defendant.

On the 25th January, 1853, the VICE-CHANCELLOR delivered the following judgment:

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In this case a bill was filed on the 23rd May, 1850, to recover property held by the defendant, consisting of certain leasehold premises, held under leases for lives of the prebendary of the prebend of Wiston. The facts are as follow: Catharine, Lady Stourton, the widow of the seventh Lord Petre, and afterwards the wife of Lord Stourton, died on the 31st January, 1785. She was owner in fee of large estates, consisting of four portions; certain parts were in the Isle of Ely; she had estates in Lancashire; the Craven estate; and the Selby estate in Yorkshire. Part of the Selby estate

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(1) 69 R. R. 278 (2 Jo. & Lat. 182).

(5) 80 R. R. 80 (16 Sim. 323).

(2) 72 R. R. 154 (3 Jo. & Lat. 658).

(4) 60 R. R. 324 (13 Sim. 199).

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consisted of the advowson of the vicarage of Brayton and of some lands in that parish, and of two-thirds of the great tithes. The remaining one-third of the great tithes, and one-third of the small tithes, belonged to the prebend of Wiston; and the advowson, and the one-third of the great and small tithes were held by Lady Stourton under a lease for lives, under the prebendaries of the prebend of Wiston. When Lady Stourton made her will in 1753, she had a grandson, Robert Edward, the ninth Lord Petre, and three granddaughters; and her grandson had three children, Robert Edward Petre, his eldest son, afterwards the tenth Lord Petre, George William Petre, his second son, and Ann Petre.

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Lady Stourton, being a second time a widow, made her will in 1753, and by it she directed her property in the Isle of Ely, and certain other property, to be settled in a given way. Nothing turns on her disposition of this portion of her property. As to her Lancashire and Craven estates, she directed them to be settled on her grandson, the ninth Lord Petre, for life, and after his decease, thus: "for such one or more of his younger sons in tail male as he should by deed or will appoint; and in default of such appointment, then to such of his sons as *at his decease should be his second son in tail male," with remainder to such of his sons as at his decease should be his third son, and remainder to all his younger sons successively, according to seniority of age and priority of birth, in tail male. As to the Selby estate, of which part was renewable leasehold, she directed that to be settled in the same manner as the Lancashire and Craven estates. The Lancashire, Craven, and Selby estates were thus limited to the ninth Lord Petre for life, and after his decease, in default of appointment, to his second, third, and other younger sons successively in tail male, but with power to appoint to any younger son in tail male.

Lady Stourton, some years afterwards, viz. on the 10th May, 1784, made a codicil to her will, and expressing her desire to extend the power of appointment given by her will to her grandson Lord Petre, she directed all her Yorkshire, Lancashire, and Craven estates, and all her leaseholds there, to be settled after his decease on such one or more of his younger sons, and such of his grandsons, or both, for such estates and on such conditions as her said grandson should by deed or will appoint. She extended, therefore, the power of appointment given to the ninth Lord Petre, by allowing him to appoint to any of his younger sons or grandsons, and for such estates as he should think fit.

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She made other codicils, but they are not material. She died on the 31st January, 1785, and the ninth Lord Petre proved her will and codicils. As to the leaseholds held for lives of the prebendary of Wiston, they consisted of one-third of the great tithes, and one-third of the small tithes, held under a lease of the 12th March, 1784, by which they were granted and leased to her and her heirs for the lives of herself and Robert Edward *Petre, afterwards the tenth Lord Petre, and G. W. Petre, and the life of the longest liver of them. When Lady Stourton died, her life had to be replaced; the other two lives, R. E. Petre, the tenth Lord, and G. W. Petre, being still subsisting.

On the 15th April, 1785, the ninth Lord Petre, Lady Stourton's heir and executor, took a renewed lease from the then prebendary of Wiston, to him his heirs and assigns, for the lives of himself and his two sons Edward Robert, afterwards the tenth Lord Petre, and G. W. Petre. In August, 1785, G. W. Petre, being then in his twentieth year, married Mary Howard, and articles of agreement were entered into, dated the 1st August, 1785, whereby the ninth Lord Petre and G. W. Petre contracted with trustees (of whom one was J. C. Throckmorton afterwards Sir J. C. Throckmorton) that, if the marriage should take effect, and he, G. W. Petre, should attain twenty-one, then the ninth Lord Petre and G. W. Petre would, within three years from the date of the articles, settle and assign messuages, lands, and hereditaments, part of the estates devised by the will of Lady Stourton, of the yearly value of 1,000/., for the benefit of G. W. Petre and Mary Howard and their issue, as mentioned in the articles. On the 10th January, 1787, G. W. Petre attained twenty-one, and then the covenant had to be performed; and by a deed poll, dated the 20th July, 1787, the ninth Lord Petre exercised his power under Lady Stourton's will as to the Lancashire estates only, by appointing them, after his decease, to the use of G. W. Petre and the heirs male of his body, with divers remainders over similar to those mentioned in the will and third codicil of Lady Stourton. And by a bargain and sale dated the 23rd July, 1787, being, in fact, part of the same transaction, Lord Petre *and G. W. Petre conveyed the Lancashire estates to the tenant to the *precipe* for suffering a recovery, to enure to the use of the ninth Lord Petre, the appointee in fee. On the 18th of August, 1787, a recovery was accordingly duly suffered.

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In the following January, 1788, the ninth Lord Petre having lost his first wife was about to marry a second time; and on that marriage a series of deeds was executed, and on those deeds, or on

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some of them, the plaintiff founds his title. They must, therefore, be examined with some degree of minuteness.

The first of these deeds were indentures of lease and release, dated the 9th and 10th January, 1788. The deed of the 10th January, 1788, was made between the ninth Lord Petre of the first part; Robert Edward Petre, his eldest son, afterwards the tenth Lord Petre, of the second part; G. W. Petre of the third part; Lord Waldegrave of the fourth part; and Lord Stourton and Sir J. C. Throckmorton of the fifth part. (Sir J. C. Throckmorton was also one of the trustees of the marriage articles of 1785, executed on the marriage of G. W. Petre.) This deed recites the will and third codicil of Lady Stourton, her death, &c.; it recited her title to the church and tithes of Brayton under the lease from the prebendary of Wiston, the renewed lease to the ninth Lord Petre, of the 15th April, 1785, the deed-poll of the 20th July, 1787, the bargain and sale of the 23rd July, 1787, and the recovery. And then the *testatum* was as to the Lancashire, Craven, and Selby estates, to Lord Waldegrave and his heirs, to the following uses: As to the Selby and Craven estates which were in Yorkshire, subject to a term; to the use of the ninth Lord Petre for life, with remainder to Lord Waldegrave to preserve contingent remainders, *remainder to the use of such one or more of the sons of the ninth Lord Petre, or such one or more of his grandsons, or both, or such of his younger sons and such of his grandsons, and for such estates and upon such conditions as he should appoint by deed or will; and subject thereto, to such other of the uses in the will and codicils of Lady Stourton as were subsisting. And as to the Lancashire estates (subject to the term), to the use of the ninth Lord Petre in fee. This deed, so far as relates to the four estates of Lady Stourton, in effect followed mainly the directions of her will, the only deviation from the limitations in that will being in respect of the Lancashire estates. As to those, instead of declaring the uses according to the directions of Lady Stourton's will, it declares them according to the bargain and sale and recovery of 1787. Besides the fee simple estates, the deed of the 10th January, 1788, deals also with the prebendal leaseholds, and those it limits to the use of Lord Waldegrave, his heirs and assigns, in trust "for such person and persons as by virtue of or under the limitations thereinbefore contained should for the time being be entitled to the manors and other the fee simple hereditaments thereinbefore granted and released, situate and being in the county of York, to the end and intent that the said leasehold premises

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might go and be held and enjoyed with the same fee simple hereditaments so far as the nature of the different estates, &c., would permit."

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And I may here mention, that not only is the leasehold property the subject of a distinct operative part in this deed, but the subject of a separate lease for a year.

The next of the series of deeds executed in 1788 is a deed-poll of the 11th January, 1788, endorsed on the *deed of the 10th; and by that deed-poll the ninth Lord Petre executes his power of appointment by appointing the Yorkshire estates comprised in the deed of the 10th, to the use of G. W. Petre, his heirs and assigns; and then he appoints that Lord Waldegrave shall hold the remainder and reversion expectant upon the death of him, the ninth Lord Petre in the church and tithes, and other leasehold premises for lives granted by the deed of the 10th, in trust for G. W. Petre, his heirs and assigns; and on that deed the plaintiff founds his right. These deeds vested the beneficial interest in the property comprised in them on the ninth Lord Petre for life, with remainder to G. W. Petre, Lord Waldegrave being the trustee.

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The next of the series of deeds of 1788 (material to the present case) are a lease and release of the 14th and 15th January, 1788; and these deeds carry into effect the covenant entered into by the ninth Lord Petre and G. W. Petre on the marriage of G. W. Petre. Next comes the most material of the series, dated also the 14th and 15th January, 1788, a settlement by lease and release, on the second marriage of the ninth Lord Petre with Lady Juliana B. Howard, an infant of the age of eighteen. By this settlement G. W. Petre, who, subject to his father's life estate, was the owner in fee of the Selby estate, joined with his father in settling it to the use of trustees for a term of years for raising pin-money, and subject thereto to the use of the ninth Lord Petre for life, remainder to Lord Stourton and Sir J. C. Throckmorton, to support contingent remainders, and after limitations to provide for a jointure, and for provisions for the children, remainder to the use of the first and other sons successively of the ninth Lord Petre by his said intended wife, in tail male, with an ultimate limitation *to the ninth Lord Petre in fee. With respect to this deed the plaintiff's contention is, that though G. W. Petre did join with his father in conveying the Selby estate, he did not convey his interest in the leasehold property, the one-third of the great tithes, and the

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one-third of the small tithes comprised in the prebendal leases, but that those leasehold premises remained as previously settled.

Before considering the effect of that deed, I will pass on in the narrative of the circumstances. On the 22nd October, 1797, G. W. Petre died intestate, leaving several children, of whom G. Petre was the eldest, and H. Petre, the plaintiff, was the second son. G. Petre was an infant of the age of twelve, and on the death of G. W. Petre the remainder in fee in the Craven estates descended to G. Petre, and of course if G. W. Petre had not parted with the leasehold property, that also descended on G. Petre as his heir. Now G. W. Petre being one of the lives in the prebendal lease of the 15th April, 1785, on his death it was necessary to renew, and then this took place. The lease was vested in Lord Waldegrave as trustee; but the ninth Lord Petre overlooking that, himself took a renewed lease in December, 1798, by which the church and tithes and premises in the parish of Brayton were leased to him, the ninth Lord Petre, his heirs and assigns, for the lives of himself, R. E. Petre, and Edward R. Petre. It is material to observe this, because if the ninth Lord Petre had considered that G. Petre, the son of G. W. Petre, was the person entitled, the probability is that he would have inserted the life of G. Petre, instead of inserting, as he did, the life of his own infant son by his second marriage. At this time the prebendal lease of April, 1785, was still in existence, in Lord Waldegrave. The grant of this renewed lease of course did not put an end to the previously existing lease; and if the mistake had been *discovered at the time, the Court would have set it right. But the new lease being granted to the ninth Lord Petre, while there was a subsisting lease remaining in Lord Waldegrave, had this effect, that there were at law two concurrent leases.

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On the 2nd July, 1801, the ninth Lord Petre died; and this is a material date, because on his death the remainder, which vested in G. Petre, as the plaintiff contends, became an estate in possession. The ninth Lord Petre left a widow and issue by his first and second marriages. By the first, R. E. Petre and Ann Catharine Petre, and the children of his deceased son; of the second marriage, three children, E. R. Petre, through whom the defendant claims, and two daughters; E. R. Petre was then seven years old. The ninth Lord Petre by his will and codicils, appointed his widow, Lady Juliana Barbara, guardian of his son E. R. Petre. On the death of the ninth Lord Petre, E. R. Petre entered into possession

(by his guardian) of the rents of the Selby estate, and also of the church and tithes of Brayton. That entry, according to the plaintiff's contention, was unlawful.

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The next transaction is this : the ninth Lord Petre having been one of the lives, the tenth Lord Petre takes a renewed lease dated the 29th January, 1802, of the tithes, &c., to himself, for the lives of himself and E. R. Petre and his own infant son, afterwards the eleventh Lord Petre. He does not put in the life of G. Petre, who, according to the plaintiff, was the person entitled, but that of his own infant son. Then by a deed of the 10th June, 1803, endorsed on the renewed lease, and made between the tenth Lord Petre of the one part, and Lord Stourton and Sir J. C. Throckmorton of the other part, it was witnessed, that the said *tenth Lord Petre conveyed to Lord Stourton and Sir J. C. Throckmorton, the hereditaments and premises comprised in and demised by the indenture of lease of the 29th January, 1802, to such uses, upon such trusts, and for such ends, intents, and purposes, and under and subject to such powers, provisoes, conditions, charges, payments, limitations, declarations, and agreements as limited, expressed, and declared or directed, and contained concerning the same, in the said indenture of release of the 15th day of January, 1788. Now the plaintiff contends that no uses of this leasehold property were declared, because he says the property was not included in it. However, at any rate, the parties who executed the deed declared that the leaseholds should be held upon the trusts of the settlement.

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The next circumstance to be referred to occurs on the 30th July, 1807, when G. Petre, under whom the plaintiff claims, attained twenty-one ; and if the plaintiff is right, he was then, at any rate, under no disability. On the 29th March, 1809, the tenth Lord Petre died. On the 13th July, 1810, a renewed lease was taken from the prebendary of Wiston, to Lord Stourton and Sir J. C. Throckmorton, for the lives of E. R. Petre, W. H. F. Petre, and Charles H. Howard. Here, again, the life of a stranger was put in instead of the life of G. Petre, which would scarcely be expected if G. Petre was the person whom the parties then considered entitled ; and it is to be observed, that the expense of these deeds and of the renewal fines was paid by the Dowager Lady Petre as guardian of her son E. R. Petre, and out of money belonging to his estate ; and in order to preserve the character of personalty to these monies, a deed was executed on the 14th July, 1810, between Lord Stourton and Sir J. C. Throckmorton, of *the one part, and Juliana Barbara,

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Dowager Lady Petre, of the other part. This deed recites that, under the settlement of the 15th June, 1788, E. R. Petre was entitled to the rents and profits of the leasehold hereditaments comprised in the indenture of lease of the 29th January, 1802; and it witnesses that Lord Stourton and Sir J. C. Throckmorton declared and agreed to and with the said Juliana Barbara, Lady Petre, her executors, administrators, and assigns, that they, Lord Stourton and Sir J. C. Throckmorton, and the survivor, and the heirs of the survivor, would stand seised of and interested in the said leasehold hereditaments and premises comprised in the said last-mentioned indenture of lease (*viz.* the lease of 13th July, 1810), with their appurtenances, upon trust from and out of the rents, issues, and profits thereof, or by mortgage or sale of the same, or any part thereof, during the time to come, &c., to levy and raise the sum of 787*l.* 2*s.* 8*d.* thereinbefore mentioned to have been paid for the renewal of the lastly thereinbefore recited indenture of lease, and the costs, charges, &c., with interest, and to pay the same to the said Juliana Barbara, Dowager Lady Petre, her executors, administrators, or assigns, and subject to such payments upon the trusts limited, &c., of and concerning the said hereditaments and premises, (together with others), in and by the said indenture of settlement of the 15th January, 1788; so that this deed recites actually, that under the settlement of 1788, E. R. Petre was entitled to the leaseholds.

[*385] So matters continued till the 28th of September, 1815, when E. R. Petre attained twenty-one. Up to that period he had been by his guardian in possession since the death of Lord Petre, and he remained in possession till 1848; in November, 1815, he suffered a recovery. In July, 1829, E. R. Petre married the defendant, and by indentures *of the 17th and 18th July, 1829, reciting, amongst other things, that E. R. Petre was seised of an estate in fee simple in possession, of all the manors and other hereditaments thereinafter particularly mentioned, except certain parts thereof, being part of the hereditaments in Brayton aforesaid, mentioned in the schedule thereunder written, which were held by the said E. R. Petre under a lease for lives under the prebend of the prebendary of Wiston, in the cathedral church of York, the said E. R. Petre did convey and assure to W. H. F., Lord Petre, and the Earl of Surrey and their heirs, certain fee simple manors, estates, and premises therein mentioned and described, being of very much greater annual value than 2,000*l.*, to hold the same unto the said W. H. F., Lord Petre,

and Earl of Surrey and their heirs for ever. Nevertheless, to the use of said E. R. Petre and his heirs until the solemnization of the said then intended marriage, and from and after the solemnization thereof, to the use of Henry Valentine Stafford Jerningham and Charles E. Jerningham, their executors, administrators, and assigns, for the term of 99 years, upon certain trusts for raising and paying the annual sum of 500*l.* by way of pin-money to the said defendant Laura Maria Stafford Petre; and subject thereto to the use of said E. R. Petre and his assigns, for his life, with remainder to the use of said William Henry Francis, Lord Petre, and Earl of Surrey, and their heirs, during the life of said E. R. Petre, upon trust to support the contingent remainders thereafter limited, with remainder, to the use, intent, and purpose that said defendant L. M. S. Petre, in case she should survive said E. R. Petre, should yearly receive for her life one annual sum or yearly rent charge of 2,000*l.*, issuing and payable out of all the said hereditaments and premises thereinbefore granted and released, such yearly rent charge *to be in full for her jointure, and in bar of dower, freebench, or thirds at common-law or by custom, and subject thereto to the use of Philip Augustus Hanrott and John Wright, for the term of 500 years, for securing the payment of such rent charge, with remainder to the use of the first and every other son of the body of said E. R. Petre on the body of said defendant L. M. S. Petre to be begotten, severally and successively in tail male, with remainder to the use of the said E. R. Petre, his heirs and assigns for ever. And by the said now stating indenture of release and settlement it is further witnessed, that for the considerations therein mentioned, said E. R. Petre did grant, bargain, sell, and release unto said W. H. F., Lord Petre, and Earl of Surrey, and their heirs, all the messuages, lands, and other hereditaments particularly mentioned in the schedule thereunder written, which were held by said E. R. Petre by virtue of any lease or leases for lives, under said prebendary of the prebend of Wiston, and all the appurtenances thereof, to hold the same unto and to the use of W. H. F., Lord Petre, and Earl of Surrey, and their heirs and assigns, for the lives of the persons for whose lives the premises were then held, and for the lives and life of the survivors and survivor of them, subject to the payment of the rent, and performance of the covenants reserved and contained in the leases thereof, upon the trusts thereafter declared concerning the same, viz., upon trust out of the rents and profits thereof, or by way of

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mortgage, to raise sufficient money to pay the fines, fees, and expenses of renewing the existing or any future leases of said hereditaments. And it was by the said now stating indenture of release and settlement declared that the said trustees, and the survivor of them, and the heirs of such survivor, should stand possessed of the said leaseholds, hereditaments and premises, *upon such trusts and to and for such intents and purposes, as would nearest correspond with the uses and trusts thereinbefore declared concerning the said manors, estates, and hereditaments so thereby granted and released as aforesaid.

There was no issue of the marriage, and therefore the intermediate limitations are immaterial. By the same deed, E. R. Petre granted all the messuages in the schedule, held by virtue of any leases. By this settlement, then, of 1829, the property comprised in it was, for valuable consideration, that is, the consideration of marriage, conveyed to Lord Petre and Lord Surrey, in trust for the benefit of himself and his wife, &c.

From that time E. R. Petre remained in undisturbed possession down to the time of his death; and by his will he devised his real and personal estate to his wife, the defendant.

It is admitted by the defendant, that what was done subsequently does not affect the question, the defendant claiming under the devise of her husband, E. R. Petre.

The bill was filed on the 23rd May, 1850, and the plaintiff by that bill insists, that by the effect of the marriage settlement of 1788, he is entitled in fee to the leases for lives. The interest in remainder of G. Petre, fell into possession in 1801; and the plaintiff claims as the heir of G. Petre who died without issue.

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Now the first question is, whether the leasehold property was included in the settlement of 1788. If it was, then there is an end of the plaintiff's case. That *question must of course be tried by reference to the words of the deed itself. The plaintiff's contention is this. He says: there are no words in the deed of 1788, sufficient to pass the leaseholds. I am not now considering whether it was the intention of the parties that they should pass, but whether they did pass; whether the words of the deed are sufficient to pass the leasehold. The plaintiff, to show that they are not, says, that in the deed of the 10th January, 1788, which did pass the leasehold, there is not only a separate operative part but a separate lease for a year, applicable to the leaseholds. It is clear that in that deed there was enough to pass the leaseholds. But is

it equally clear that there are not in the deed of the 15th, words sufficient of themselves to pass the leaseholds? It must be considered what was the nature of the property; the leases use words which would carry any hereditament; but did the property in fact consist of anything but tithes? To ascertain this I have resorted to the two Enclosure Acts, the 36 Geo. III. c. 76, and the 39 Geo. III. (His Honour referred to them to show that in them the property was treated as tithes, and proceeded.) And in some of the deeds the leaseholds are spoken of as tithes; and I conclude, that in the leasehold property nothing but tithes was comprised. If that is so, now let us refer to the words of the settlement of the 15th January, 1788. (His Honour referred to the description of the parcels comprising the Selby estate, and to the words "and also the parts or shares," &c., (p. 704).) Then after describing other portions of property, come the words, "all and singular other the fee simple manors or lordships, &c., tithes, rents," &c., whatsoever, devised by the will of Lady Stourton (p. 704). Now what were the parts and shares which Lady Stourton had? She held in fee two-thirds of the great tithes and under leases, *one-third of the great tithes, and one-third of the small tithes. As to the words used, they are in themselves sufficient; besides, Lady Stourton held no part of the small tithes in fee-simple; she had no estate except leasehold in any such tithes. If the case then stood merely on the words, there are words enough; I am now only on the dry point on which the plaintiff's case is based, that there are no words in the settlement capable of comprising the property in question.

But although the words in themselves are enough, still, after the words to which I have referred, come the general words, "all and singular, other the fee simple, manors," &c. Now, it is a fair argument for the plaintiff to say, on the question whether the parties intended the leasehold to pass, that it was not so intended, because though the words first used may be large enough, they must be restricted by the subsequent words. I must also give the plaintiff the benefit of this argument. He says the deed of settlement, in stating the parcels, states them in the same manner as in the deed of the 10th January, 1788. Now by the description in that deed, he argues, it was not considered by the parties that the leaseholds passed, because if it had been so considered, they would not have introduced as they did a separate operative part to pass the leaseholds; no doubt that is a good argument on the question

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of intention, though not on the question whether there are words *per se* of sufficient force. If then the question between the parties turned on that dry question, I think there are sufficient words to pass the leaseholds; but *non constat* that the deed did actually pass them. To ascertain that, it must be seen what, on consideration of the whole, was the intention. Now if I look to the intention, if it stood on the deed alone, it would be *doubtful whether it was the intention of the parties to pass the leaseholds. The winding-up by saying, "all other the fee simple manors," &c., leads rather to the inference that the intention was only to pass fee simple property.

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But then passing to the next question, do I find from all that took place from and including the time of the execution of the deed of 1788 to the present time, any indication of the intention of the parties? Of course I could not construe the deed itself by *matter dehors* the deed; but the question of intention has a material bearing on another view, to which I shall have presently to refer. Now I find the Selby estate, the fee simple property clearly intended to pass by the settlement of 1788, comprised certain fee simple lands in the parish of Brayton, subject to tithes, and comprised two-thirds of the great tithes. Now it is contrary to probability that when the parties were settling this estate, consisting of land and tithes, they should not intend to make the two go together. (His Honour referred also to the deed of 10th January, 1788.) That deed conveyed the tithes and other hereditaments and premises comprised in the lease of the 15th April, 1785, to Lord Waldegrave, in trust for such person and persons as by virtue of or under the limitations thereinbefore comprised, should be entitled to the fee simple estate, thereby conveyed. And then followed these words, "to the intent that the said leasehold premises might go and be held and enjoyed with the same fee simple hereditaments, so far as the nature" &c. Though that is not conclusive as to the intention, it is on the whole evident that, in the deed of the 10th January the parties did mean that the leaseholds should go with the Selby estates. Again, the ninth Lord Petre, when he took a renewed

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lease, would naturally have put in the *life of the person entitled after his own death, and his putting in the life of his infant son by his second marriage, affords an inference that he considered the leasehold property would go to that infant son. Add to this what, in my mind, is almost conclusive, viz. the whole course of conduct. On the death of the ninth Lord Petre, it is not G. Petre who

enters into possession, but E. R. Petre, by his guardian ; that assumes that all the parties then supposed that E. R. Petre was entitled. Again, in the renewed lease taken by the tenth Lord Petre, he puts in the life, not of G. Petre but of his own infant son. Then in the transactions of 1802 and 1803, the deed of the 10th January, 1803, assumes that the trusts of the settlement of 1788 comprised the leasehold property, and the fee and fines in the renewed lease of 1802 were paid by the Dowager Lady Petre, as the guardian of E. R. Petre. The deed of the 14th July, 1810, contains an express recital that E. R. Petre was, under and by virtue of the trusts and limitations contained in the settlement of 1788, entitled to the rents, issues, and profits of the leasehold hereditaments and premises comprised in the indenture of lease of 29th January, 1802. And E. R. Petre on his marriage settles the Selby estates, including the leaseholds. But then, in addition, there is this : the professional gentleman who is alleged by the plaintiff to have been the solicitor by whom the whole series of deeds of 1788 was prepared, and the whole arrangement carried into effect, was the solicitor of the Petre family ; he knew what the intention of the parties was ; and unless I attribute fraud to him I must assume that he considered not only that the parties intended in the settlement of 1788 to comprise the leaseholds, but that they were so included.

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To meet this, the plaintiff suggests a conspiracy to *defraud G. Petre by purposely concealing from him the deeds relating to the property ; and the parties so charged with fraud are not only Mr. Pearson the solicitor, but the Dowager Lady Petre, the tenth Lord Petre, Lord Surrey, Sir J. C. Throckmorton, and of course E. R. Petre ; nor is the ninth Lord Petre exempted entirely from the charge. At present, on this part of the subject, I will only say that I think the whole allegation of fraud is a pure and entire fiction.

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The conclusion to which I come thus far is, that on the question of intention, (not looking at it for the purpose of construing the deed,) I do not feel any doubt that the parties intended the leasehold property to pass with the Selby estate. As to the question on the construction of the settlement of 1788, whether the words in it are sufficient to pass the leaseholds, I think there are words sufficient ; but whether the leaseholds did actually pass, I have some doubt ; I incline to think they did, and if they did, there is an end of the question. But even on the assumption that the settlement did not pass them, I think the Statute of Limitations is a bar.

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For the purpose of considering the effect of the Statute of Limitations, I shall assume that on the death of the ninth Lord Petre, the party entitled was G. Petre, the then infant son of G. W. Petre, and that the entry of E. R. Petre by his guardian was a wrongful entry. The estate which the plaintiff claims through G. W. Petre, is the estate which was vested in remainder in G. W. Petre, expectant on the death of the ninth Lord Petre ; the plaintiff admits that the Statute of Limitations is a bar to his claim, unless the case falls within the 25th or 26th sections affecting express trusts or concealed fraud.

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The first question is, whether it is within the 25th section. (His Honour read the 25th section of the 3 & 4 Will. IV. c. 27,) and proceeded. In order to determine the question under that section, it is necessary carefully to consider its terms. Now the expression "claiming through him," occurs three times in the section, and has in each place the same meaning : it means "deriving title," and that is in accordance with the first, the interpretation clause. The 25th section is also confined to express trusts ; that is, trusts expressly declared by a deed, or a will, or some other written instrument ; it does not mean a trust that is to be made out by circumstances ; the trustee must be expressly appointed by some written instrument ; and the effect is, that a person who is under some instrument an express trustee, or who derives title under such a trustee, is precluded, how long soever he may have been in enjoyment of the property, from setting up the statute ; but, if a person has been in possession, not being a trustee under some instrument, but still being in under such circumstances that the Court, on the principles of equity, would hold him a trustee, then the 25th section of the statute does not apply ; and if the possession of such a constructive trustee has continued for more than twenty years, he may set up the statute against the party who, but for lapse of time, would be the right owner ; that is the construction that I put on the 25th section of the statute. The section is confined to the case of a bill being filed by the cestuis que trust against express trustees, or those claiming under them ; that is, to suits in which the contest is between those two parties ; and it has no application where the contest is as to a right between the cestuis que trust and third persons, not being express trustees. If that were not so, what would be the meaning, in the 25th section, of the words "to bring a suit against the trustee ?" &c. The statute is to apply *where the contest is between the cestui que trust and the

person alleged to be an express trustee; not to the case where the trustee may be a constructive trustee, but is not an express trustee. Now I will assume that on the death of the ninth Lord Petre, G. Petre was entitled to enter as cestui que trust, the legal estate being in Lord Waldegrave as express trustee; the ninth Lord Petre not being an express trustee for anybody, took the lease of the 18th December, 1798. Now I may assume that if a bill had then been filed by G. Petre, the Court would have declared that the ninth Lord Petre was a trustee for him; he was in fact a constructive trustee, assuming that G. Petre was entitled beneficially. When he died, the tenth Lord Petre, acting on the lease of 1798, takes a renewal, the lease in Lord Waldegrave still subsisting, the legal estate being still in him as a trustee on express trusts. The tenth Lord Petre was not declared a trustee by any instrument; and by the deed of June, 1803, he assigns the lease to trustees for the persons entitled under the trusts of the settlement of 1788; that is the only express trust declared by the deed of 1803; and if, as the plaintiffs say, there were no trusts of that leasehold property in the settlement of 1788, then there was no express trust of them in the deed of the 10th June, 1803.

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In 1810, the fines and expenses on taking the renewed lease of the 13th of that month, were paid by the guardian of E. R. Petre out of his monies; and by the deed of the 14th July, reciting the lease of the 13th, there was an express declaration of trust of the leasehold premises, for such trusts, &c., as were limited, expressed and declared of and concerning the said hereditaments and premises, in and by the then recited indenture of release and settlement of the 15th *January, 1788; that is, an express trust for E. R. Petre, who was tenant in tail under that settlement. Now, was the ninth Lord Petre an express trustee for the plaintiff? Was the tenth Lord Petre such trustee? Were Lord Stourton and Sir J. C. Throckmorton, the trustees of the deeds of the 11th and 14th July, 1810, express trustees for the plaintiff? But supposing they could have been considered as express trustees, how could E. R. Petre be treated as a trustee at all for G. Petre? In the contest between the present plaintiff claiming under G. Petre, and E. R. Petre, or those claiming under him, there is clearly no case of express trust.

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There are several cases on the subject of the statute, but they are all cases of charges on land (except *Salter v. Caranagh* (1)) or of legacies, within the 40th section, or of annuities. But I may refer

(1) 56 R. R. 222 (1 Dr. & Wal. 668).

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to what fell from Lord St. LEONARDS, in *Law v. Bagwell* (1). He says: "The 25th section of the late Statute of Limitations, providing for express trusts, renders lapse of time unimportant in all cases within the section, that is between the cestui que trust and his trustee, unless the trust is disturbed, and that disturbance can only be effected by such a denial of the trusts as takes place when the trustee sells to a third party for valuable consideration, the property held by him in trust." (His Honour referred also to the case of *Commissioners of Charitable Donations v. Wybrant* (2) and continued:) That case does not apply, neither do *Ward v. Arch* (3), nor *Goff v. Bult* (4). *Francis v. Grover* (5) was a case of an annuity. In the case of *Young v. Lord Waterpark* (6), *the facts are not fully reported in Simons, but they are very fully stated in the 6 Jurist. (His Honour stated the facts of that case, and continued.) When that case was cited from the report in 13 Simons, to Lord St. LEONARDS in *Chappell v. Rees* (7), his Lordship's observation was this: that it did not appear, from the report of the case in Simons, whether the relation of trustee and cestui que trust subsisted between the party having the estate and the person entitled to the money; but he presumed such was the case, as the VICE-CHANCELLOR said, &c. That case came on on appeal before Lord LYNTHURST (8), and he referred to the 40th section of the Act, but did not mention the 25th. He says: "In this case the term for 500 years is still in the trustees, and there is nothing therefore contained in the statute to prevent them from raising the residue of the 10,000*l.* in the manner directed by the settlement; and the money when so raised would be held by them as trustees for the purposes of the settlement, *i.e.* for the use and benefit of the parties entitled under the settlement; and therefore, as to the two-seventh shares, for the use and benefit of the plaintiff, the personal representative of two of the younger children. To a case like the present, between a trustee and cestui que trust, the statute of William IV. has no application. The trustee did not hold adversely to the cestuis que trust, but for them and for their use and benefit." I refer to the case of *Young v. Lord Waterpark*, on account of the observations of Lord St. LEONARDS, made in reference to it as it stood in the report cited to

(1) 4 Dr. & War. 398.

(2) 69 R. R. 278 (2 Jo. & Lat. 182).

(3) 56 R. R. 99 (12 Sim. 472).

(4) 80 R. R. 80 (16 Sim. 323).

(5) 71 R. R. 26 (5 Hare, 39).

(6) 60 R. R. 324 (13 Sim. 199; 6

Jur. 656); and on appeal, 60 R. R. 328 (15 L. J. Ch. 64).

(7) 91 R. R. 129 (1 D. M. & G. 393).

(8) 60 R. R. 328 (15 L. J. Ch. 64).

him from 18 Simons; but in his Lordship's essay on the new statutes, he refers to it at pp. 41 and 105; in the latter *page he says: "In the case of portions secured by a term of years, for example, where they have not been raised within the time of limitation under the 40th section, yet if the term which secures them is not barred, the trustees are not prevented from raising the portions, and when raised, they will hold the money as trustees for the children. In such a case, between trustee and cestui que trust the statute has no application. The trustees do not hold adversely to the cestuis que trust, but for their benefit."

There are several other cases which have been cited, but I abstain from commenting upon them, as I do not think they apply.

I am of opinion, on the whole, on this part of the case, that it does not fall within the 25th section of the statute.

Next, supposing that I was of opinion that the statute does apply, still the right to file a bill accrues at the time at which the land shall have been conveyed to a purchaser: sect. 25. Now, in 1829, E. R. Petre being in possession, conveyed for valuable consideration his estates, expressly including the leaseholds in question, to trustees to certain uses. There was, therefore, more than twenty years before the bill was filed, a conveyance to a purchaser. If, therefore, it had been even a case of express trust, the statute would not apply.

Then, does this case come within the 26th section? Firstly, what is meant by concealed fraud? It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the *circumstances giving that right, and by means of such concealment enables himself to enter and hold. The plaintiff shows by his bill that he knows what is meant in the statute by concealed fraud, for he alleges a conspiracy, in which all the persons I have named, in before alluding to this part of the case, must have been parties. I confess I can see no ground even suggested for concluding there was any such conspiracy or fraud, except the single fact that E. R. Petre entered, and that all parties have acted on the assumption that he was the person entitled. (The VICE-CHANCELLOR went in some detail through all the circumstances of the case, with reference to the question whether any fraud could be imputed, and concluded that there had been no concealment; that there was no ground for supposing that all the material transactions had not, or at least might not, with reasonable diligence, have

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been known to the plaintiff or those through whom he claimed; and unless that conclusion could be arrived at, his Honour was of opinion that the 26th section of the statute did not apply. His Honour then continued: I am of opinion, on the whole, that the statute is a bar to the plaintiff's claim. But if there were no question of the statute, if I was proceeding on the ordinary principles applied to cases of adverse enjoyment, consider the date of the transactions. The original deed on which the plaintiff founds his claim, was executed so far back as 1788, sixty-two years before the bill was filed. Every person concerned in the various transactions who could explain the intention of the parties to them, is dead. If such a bill as this had been filed while some of them were living, and a counter bill had been filed by the ninth Lord Petre, or by E. R. Petre, asking the Court to rectify the settlement of 1788, can I now conclude that the latter bill would have been unsuccessful? Can I, after sixty-two years have *elapsed, and on the materials before me, conclude that the Court would not have directed the settlement to be rectified so as to include the leasehold property? Must I not rather come to an opposite conclusion, if I could come to any?

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Another view which has been justly pointed out by the counsel for the plaintiff is, that there is great reason to conclude, as to the appointments made by the ninth Lord Petre, that they might have been set aside as frauds upon his power. Suppose now that immediately after the death of the ninth Lord Petre, such a bill as this had been filed, the plaintiff insisting on his title; and suppose E. R. Petre had filed a bill to rectify the settlement, insisting that the appointments were void. If the Court had come to the conclusion that the appointments were a fraud on the power, who would have been entitled? Why, all these estates would have gone to E. R. Petre, the person against whose right this bill is filed. There would be, at this distance of time, as much ground for setting aside the appointments made by the ninth Lord Petre, as for supporting the claim of this bill; and I can no more now disturb the rights of the parties, so far as they exist under one set of the deeds, than I can set them up so far as they would appear to exist under the other. I am of opinion, therefore, that on all these grounds, even if the Statute of Limitations did not apply, the bill must be dismissed with costs.

STACEY *v.* SOUTHEY (1).

(1 Drewry, 400.)

1853.
Jan. 31.KINDERSLEY,
V.-C.

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A married woman, having a life interest to her separate use in real estate, with her husband cut timber.

A suit was instituted in one branch of the Court to carry into effect the trusts of the settlement. In another branch a suit was in existence, in which a claim was made on the married woman's separate use, in respect of the timber cut :

Held, that, in the first suit, the Court could not decide the question as to the right to cut the timber; but the married woman, securing the value of the timber cut, was allowed her income pending the suit.

THIS was a suit to carry into effect the trusts of a settlement. A motion was made asking, among other things, under the 57th section of the Chancery Improvement Act, for payment to the plaintiff, pending the suit, of the income of property limited to her separate use for her life. It was alleged that there was a liability, on the part of the plaintiff and her husband, to the trust estate, in respect of timber cut by the plaintiff and her husband, before the institution of this suit. It appeared in this suit that there was another suit at the Rolls, in which it was sought to charge the plaintiff's separate income for the timber cut. There was no evidence of the value of the timber cut. The total income of the plaintiff was about 180*l.* a-year.

Mr. Shebbeare, for the motion.

Mr. Prendergast, for the trustee of the estate, opposed it.

The VICE-CHANCELLOR said, under the 57th section of the Act, he could not decide on the validity of the claim for timber. But if the value of the timber could be ascertained, the amount being brought into Court or otherwise secured; the remainder of the income might be paid to the plaintiff, without prejudice to any proceedings in the other suit at the Rolls against such income.

IN RE RANDALL'S WILL.

(1 Drewry, 401—402.)

1853.
Feb. 17.

A. and B., being trustees, the Master found that it was uncertain whether A. was living or dead: but B. was living; afterwards B. died: Held, that A. was not sole trustee within the Trustee Act, 1850; and the 22nd section of the Act did not apply.

[See now the Trustee Act, 1893, s. 35 (1) (sub-s. iii.).]

(1) See now Ord. L. r. 9.

1853.

Feb. 10, 11.

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TURNER v. BLAMIRE.

(1 Drewry, 402—413; S. C. 22 L. J. Ch. 766; 1 W. R. 190.)

Under the Inclosure Act, 1845 (8 & 9 Vict. c. 118), the Inclosure Commissioners had made a provisional order, and were proceeding to make their final award. It was disputed whether the lands intended to be inclosed by them were within the Act:

Held, that equity would not interfere to restrain them by injunction from proceeding.

THE bill in this case was by Montague John Turner, on behalf of himself and the other persons entitled under the will of William Turner. After stating the title, (which was not disputed) the bill stated, that "the Woodcote estate (which was part of the testator's estate), with the two rights of sheep walk over the adjoining lands, was duly conveyed to the testator in or about the year 1818, by the then owner, the late George Durant, Esq. (then commonly called Captain Durant and afterwards Colonel Durant), since deceased, and had been in the possession of the said George Durant for thirty years and upwards, prior to the conveyance to the testator, and is described in certain title deeds relating to the estate as, and is considered to be, an ancient manor or reputed manor. No part of the estate is or has been, at any time within the period of sixty years and upwards, before the 24th day of May, 1851, or, as the plaintiff believes, has ever been, subject *to any rights of common whatsoever, or to any gated or stinted pastures, or held, occupied, or used in common during any time or season, or periodically, or for any purposes or limited purpose; nor is the property, or right of or to the vesture or herbage of any part thereof, nor has it been, at any time within the said period, nor, as the plaintiff believes, has it ever been, during the whole or any part of the year; nor of or to the wood or underwood thereof, growing thereon, separated from the property of the soil thereof; nor does any part of the said estate consist, nor has it at any time within the said period, nor, as the plaintiff believes ever, consisted of lot, meadow, or other lands, the occupation or enjoyment of separate lots or parcels of which is or has been, at any time within the said period, subject to interchange among respective owners in any known course or rotation, or otherwise."

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"By an Act of Parliament passed in the session of the 13th year of her present Majesty, chapter 8, and which was passed without the knowledge, consent, or sanction of, and without notice to the plaintiff and the other persons beneficially interested in the Woodcote estate, under the will of William Turner, authority was given

to the Inclosure Commissioners for England and Wales to proceed with the inclosure of certain lands in the parish of Carshalton and hamlet of Wallington, in the county of Surrey, subject to the provisions of the general Inclosure Acts then in force, and John Nash, of Reigate, in the county of Surrey, was duly chosen and appointed valuer, to divide, set out, and allot the lands subject to be inclosed. Part of the lands of the Woodcote estate are uninclosed, but no part of them is subject to be inclosed, or otherwise dealt with under the special or any general Inclosure Act, without the consent in writing of *the persons legally and

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beneficially entitled thereto or interested therein.”

“ A claim was duly delivered to the valuer, on or about the 24th day of May, 1851, on behalf of the plaintiff and others legally and beneficially entitled to or interested in the Woodcote estate and premises, under the will of William Turner deceased in respect of the two several rights of sheep walk over the lands proposed to be inclosed by the Act of the 13th of her Majesty, chapter 8 ; but no application or consent in writing or otherwise, under the special or any general Inclosure Acts or otherwise, has ever been made or given by or on behalf of the plaintiff or any other person or persons legally entitled to or beneficially interested in the Woodcote estate, under the will of William Turner deceased, to the Commissioners, Assistant-Commissioner, or valuer, or any other person or persons whomsoever, for the purpose of shortening or rendering straight any boundary fences between the land to be inclosed, and any adjoining lands of the Woodcote estate ; or to set out or determine the boundaries between the land to be inclosed and such adjoining land ; or to draw or define any new line of boundary ; or to exchange any part of the Woodcote estate for any other land in the same or any adjoining parish ; or to direct any part of the lands of the Woodcote estate to be converted into or used as a regulated pasture, to be stocked or depastured in common by any other persons ; or to direct any inquiries whether any proposed change of any part of the Woodcote estate, not subject to the said Acts or any of them, would be beneficial for the owners thereof ; or to direct any inquiry whether any division or allotment of any of the lands of the Woodcote estate, lying intermixed with lands belonging to other persons, or divided into inconvenient parcels, would be beneficial to the respective owners.”

“ The plaintiff, and others of the persons beneficially interested in the Woodcote estate, have on several occasions dissented in

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writing from, and personally by their agents protested against, any interference or dealing with the lands of the Woodcote estate by the Commissioners, Assistant-Commissioner, or valuer; but notwithstanding their dissent and protests, the valuer, by himself or his agents, has entered upon lands of the Woodcote estate, for other purposes than those of surveying, valuing, or otherwise dealing with lands subject to be inclosed thereunder, and without the consent or permission of the plaintiff, or any of the persons legally or beneficially interested therein, sunk and erected certain posts and poles thereon, and altered, enlarged, and diverted a certain bridle-road, of the width of three or four feet, running through part of the Woodcote estate, through an ornamental plantation thereon, and for that purpose cutting down several trees on the plantation, and converting the former bridle-road into a new road of the width of thirty or forty feet, or thereabouts; and the valuer has in like manner, and without the consent or permission of the plaintiff or any of the persons legally entitled to or beneficially interested in the Woodcote estate, begun to alter, straighten, widen, and divert another road, on and running through part of the Woodcote estate; and has purported to allot certain of the lands of the Woodcote estate, not subject to be inclosed, to the owners of adjoining lands, and given certificates of his allotments to them; and has purported to set out, divide, and allot for inclosure a considerable part of the Woodcote estate; and has drawn up a report in writing, with a map thereunto annexed, purporting to specify all the claims allowed, and all the allotments, exchanges, and partitions made in the matter of the inclosure, and the roads, ways, and works set out and directed to be made by him, and to contain *all such particulars in relation to such allotments (including allotments of the Woodcote estate not subject to be allotted or inclosed), ways, and roads, and works, as by the said Acts directed, and other directions and determinations thereof purported to be authorized for the purposes of the inclosure; and has signed the report and sent the same with the map to the office of the Commissioners, as by the said report and map will appear."

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"The Commissioners have approved of, or intend forthwith to approve, of the valuer's report; and the valuer, under the direction of the Commissioners, has drawn up, engrossed, and signed, or intends forthwith to draw up, engross, and sign, the award in the matter of the inclosure, containing his report, or intends to annex to the engrossment the map referred to by his report; and the

Commissioners threaten and intend to confirm the award under their hands and seal, unless restrained by the order and injunction of this honourable Court."

"The defendants, William Blamire, George Darby, and Henry Charles Mules are the Inclosure Commissioners for England and Wales, duly appointed."

The bill then suggested, that if the report and award of the valuer were respectively approved and confirmed by the Commissioners, such confirmation would be conclusive evidence that all the directions in the Act in relation to such award, and to every allotment, exchange, partition, and matter therein set forth and contained, which ought to have been obeyed and performed previously to such confirmation, had been obeyed and performed, and no such award could thereafter be impeached by reason of any mistake or informality therein, or in any proceeding relating thereunto, or on account of any want of any notices *or consent required by the said Acts, or on account of defects or omissions in any previous proceeding whatever, in the matter of the inclosure, and every allotment, exchange, partition, direction, matter, and thing specified and set forth in such award as aforesaid would be binding and conclusive on all persons whomsoever.

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The prayer was, that it might be declared that no part of the Woodcote estate, late in the possession and occupation of William Turner deceased, and included in the report of the valuer, was subject to be inclosed under the Carshalton and Wallington inclosure award, without the consent of the plaintiff and the other persons beneficially interested in the Woodcote estate, under the will of their grandfather William Turner deceased.

That the defendants, William Blamire, George Darby, and Henry Charles Mules, might be restrained by the order and injunction of the Court from confirming the award of John Nash, the valuer in the matter of the Carshalton and Wallington Inclosure Act, so far as it purported to affect such of the lands of the Woodcote estate included in the report of the valuer as were not subject to be inclosed without the consent in writing of the plaintiff and other persons beneficially interested therein or legally entitled thereto, under the will of William Turner deceased.

On the question of fact, whether the land in question had been subject to rights of common, &c., within the allegations of the bill, there was much and conflicting evidence. Besides the question of fact, the defendants, the Inclosure Commissioners, denied the

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jurisdiction of the Court to stay the proceedings at all. They relied for this, first, on the 1st section of the 13 Vict. c. 8, *which they said directed the inclosure commenced to go on, and the Court could not stop that. The section of the 13 Vict. c. 8, in question, was as follows: "Whereas the Inclosure Commissioners for England and Wales have, in pursuance of an Act passed in the ninth year of the reign of her Majesty, intituled, 'An Act,' &c., (the Inclosure Act, 8 & 9 Vict. c. 118,) issued provisional orders for and concerning the several proposed inclosures mentioned in the schedule to this Act, and have in the annual general report of their proceedings certified their opinion that such inclosures would be expedient, but the same cannot be proceeded with without the authority of Parliament: be it enacted, that the said several proposed inclosures mentioned in the schedule to this Act be proceeded with." The schedule to the Act included the Carshalton and Wallington inclosures, viz., the land in question. The defendants relied also on the general Inclosure Act of the 8 & 9 Vict. c. 118. They referred for this purpose to the following sections: the 24th, 25th, 26th, 27th, 33rd, 34th, 46th, 47th, 104th, and 105th.

For the plaintiffs, *Mr. Glasse, Mr. Phinn, Mr. Tindal Atkinson and Mr. Villiers.*

Mr Bacon and Mr. Fleming, for the defendants:

It has been decided that the provisional order of the Commissioners is the subject of appeal to a court of common law (They cited on this point an unreported case, *Wheeler v. Bishop of Winchester*, and referred to the 56th and 57th sections of 8 & 9 Vict. c. 118.) In April, 1849, the Assistant-Commissioner made his report: that *was followed by the provisional order. There was full notice of the intention to inclose; the Commissioners made their report, and the Legislature has sanctioned the whole transaction by the special Act, the 13 Vict. They argued that the 56th section gave ample appeal without coming to this Court.

They relied also on the special Act, the 13 Vict., to show that the Commissioners must go on, and might be compelled to do so by *mandamus*; so that it could not be contended that this Court would interfere to stop them.

Mr. Glasse, in reply.

On the 12th of February, the VICE-CHANCELLOR delivered his

judgment, which, so far as regarded the question of jurisdiction, was as follows: The injunction that is asked by this motion is an injunction to restrain the defendants, who are the Inclosure Commissioners of England and Wales, from confirming the award of Mr. John Nash, the valuer in the matter of the Carshalton and Wallington inclosures, so far as it purports to affect such of the lands of the Woodcote estate as are not subject to be inclosed without the consent of the plaintiffs and the other persons beneficially interested therein, or legally entitled thereto, under the will of William Turner deceased; so that the notice of motion of course assumes, that if the award of Mr. Nash the valuer is affirmed, it will affect some lands in part of the Woodcote estate, which are not subject to be inclosed without the consent in writing of the plaintiffs and the other persons interested. And although the notice of motion does not, any more than I believe the bill does, point out the specific pieces of land which are alleged to be portions of the Woodcote estate, which ought not to be inclosed *without the consent in writing of the parties; although the form of the notice of motion does not, and I believe the bill does not, point out the specific lands to be taken, at the Bar they are pointed out by reference to a map, which, as I understand it, has been framed on the part of the plaintiffs. It is alleged that one of the pieces of land in that map, marked B., is land belonging to the Woodcote estate, which is not within the power of the Inclosure Commissioners, and ought not to be allotted at all.

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Now, the ground upon which I am asked to interfere appears to me to be this: that inasmuch as the Inclosure Commissioners have no right to inclose anything but what is open or common; if they are proceeding to inclose or allot anything that is not open and common land, they are going beyond the powers of their Act, and this Court has jurisdiction to interfere. Now, if that be the foundation on which this Court would interfere, the effect is, that the Court of Chancery is the Court for the inclosure of all the common lands of England. That must be the effect of it; because, whenever the Inclosure Commissioners are proceeding under the powers given them by the general Act, assisted, if necessary, in certain cases, by a special Act, to determine if certain lands are proper to be enclosed, any parties saying, "You, the Commissioners, are wrong in your view: there is an acre, or five acres, or ten acres of land which you are mistaken about," may file a bill in the Court of Chancery, to have it determined by the Court of Chancery, whether

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the Commissioners are right or not. In other words, the Commissioners have no jurisdiction (for that is the effect of it), no jurisdiction even primarily to determine what are open or common lands; what are lands subject to be inclosed under the powers of the Act. *Now it is impossible to look at the sections referred to of the Act without coming to this conclusion at least, that the Inclosure Commissioners are, as they are directed to do by the 25th section, to hold a preliminary meeting to inquire into the expediency of inclosing lands when those lands are fixed upon by them as proper to be inclosed. They are then to proceed to consider what is suggested to them, and the Assistant-Commissioner, who is the person to hold this preliminary meeting, is to report whether the inclosure should take place. It is quite clear, that although the Assistant-Commissioner may be liable to be controlled in the exercise of his judgment, he is at least the person in the first instance to determine what lands are to be inclosed; and when he has determined what lands are to be inclosed, and when the general Commissioners upon his report make a provisional order directing the inclosure to proceed, or stating that by reason of their being within fifteen miles of London there must be a special Act, and that they shall report to Parliament accordingly, I say the decision of the Assistant-Commissioner or the general Commissioners, as the case may be, is either final and conclusive, or else an appeal is given by the Act of Parliament. And the Act of Parliament expressly gives an appeal from any decision whatever, whether it be the Assistant-Commissioner or the general Commissioners, to a court of law, in a certain mode pointed out by one of the sections of the Act. I quite feel this, that this Court has jurisdiction over the Commissioners. Unquestionably it has never been disputed that this Court has jurisdiction over them; but jurisdiction in what cases? This sort of case might arise; I am not, of course, using it as applicable to these particular gentlemen who are the Inclosure Commissioners. But I can conceive a case where Commissioners for a given purpose might be proceeding *in such a way as that the parties were precluded by their mode of proceeding from exercising their right of appeal. Supposing they had so proceeded, or were about so to proceed, that the parties who ought to have a right of appeal should be excluded from the exercise of that right—that is an instance in which, unquestionably, this Court would interfere to prevent any such injustice being done. But this Court surely is not the Court to sit to determine whether a particular acre of land in each particular

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case that is questioned before the Commissioners, or whether a particular field of five acres or ten acres, is or is not proper to be inclosed by the Commissioners. My own opinion is, that if that were so, this Court would have nothing but bills appealing from the decision of every Assistant-Commissioner throughout England and Wales, upon these inclosures. I wish it to be clearly understood that I am far from repudiating the jurisdiction of this Court over Inclosure Commissioners, any more than other Commissioners. We know that bills have been frequently filed, and this Court has exercised its jurisdiction over the Lords Commissioners of her Majesty's Treasury. There was a case of *Ellis v. Earl Grey* (1), in which this Court entertained jurisdiction over the Lords Commissioners of the Treasury. And there has been a case of a bill filed against the Commissioners for the Adjudication of French Claims, in which the Court interfered with respect to those Commissioners. But it is not to interfere with them in the legitimate exercise of those discretions and that authority which are conferred upon them by the Act; and clearly, one of the preliminary jurisdictions given to the Commissioners of Inclosure is to exercise their discretion and judgment in the first place, whether lands which are suggested *to them as proper to be inclosed are or are not fit and proper to be inclosed, and of a quality capable of being inclosed. But their being supposed to err in that conclusion does not authorise a party to come here to appeal from that act to the Court. The course of proceeding is, that if the Assistant-Commissioners be wrong, the party may appeal to the general Commissioners, the chief Commissioners, I may call them; or he may appeal direct from the Assistant-Commissioners, as well as from the general Commissioners, to a court of law, by a speedy process, and have the matter determined in a way in which questions of that sort are best determined, by a feigned issue, which is to go to a jury, in which the jury are to have witnesses examined before them, and are to determine upon the facts which are in controversy. It appears to me that the plaintiff is not entitled to the injunction which he asks, on this first ground, that he has not shown to me that there is any case here existing which justifies this Court in exercising a jurisdiction to prevent the Commissioners from proceeding in the regular way.

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(1) 38 R. R. 93 (6 Sim. 214).

1853.

Feb. 22.

LAMB *v.* ORTON.

(1 Drewry, 414; S. C. 22 L. J. Ch. 713.)

Under the old practice a plaintiff was not allowed to read an affidavit on a motion to produce documents, to establish the possession of documents not specifically admitted by the answer to be in the defendant's possession.

[See now Ord. XXXI. r. 19A (3) as to the proper course to be adopted where a plaintiff has reason to believe that specific documents are or have been in the defendant's possession.]

1853.

Jan. 27, 28,
29, 31.EVANS *v.* SAUNDERS.

(1 Drewry, 415—439.)

[Affirmed on rehearing, *post*, p. 793, but reversed on appeal, as reported in 6 D. M. & G. 654. The decision of the Court of Appeal was finally affirmed by the House of Lords, as reported under the title of *Saunders v. Evans*, in 8 H. L. C. 721.]

1853.

Jan. 18.

IN RE DODGSON'S TRUST (1).

(1 Drewry, 440—442.)

KINDERSELEY,
V.-C.

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A testator gave personal estate, outstanding on securities, to his wife for life, remainder in a moiety to six of his children; provided that, if any one died before receiving his or her share without leaving lawful issue, it should go over.

One of the children died after the wife's death, before the securities were realized and the produce divided: Held, that the proviso contemplated the time when the children should be entitled to receive their shares, not the time of actual payment; and that the representatives of the deceased child took a share.

JAMES DODGSON by his will gave his monies, securities, securities for money, &c., to trustees on trust, after payment of his debts, &c., to invest the same, and then upon trust for his wife for her life; and from and after her decease, he directed that his trustees should pay one moiety or equal half-part of his said personal estate to his son W. Dodgson, his executors and administrators, and should pay and divide the other moiety or half-part of his said personal estate unto and equally between and among all his children, Ann Dodgson, John Dodgson, George Dodgson, Jane the wife of Thomas Mason, Hannah Dodgson, and James Dodgson, share and share alike: the testator then gave special directions about the share of his daughter Jane Mason; and then followed this proviso: "Provided, and I do hereby declare my will to be, that if any of my six last-named

(1) *West v. Miller* (1868) L. R. 6 Ch. D. 512, 54 L. J. Ch. 1139, 53 Eq. 59, 37 L. J. Ch. 423, 18 L. T. L. T. 247.
429; *Wilks v. Bannister* (1885) 30

children should happen to depart this life before they shall receive their respective portions, without leaving lawful issue, the share or shares of him, her, or them so dying, of and in my said estate and effects, shall go and accrue to the survivors or survivor of such children, and be equally divided among them; if more than one, share and share alike, and if but one, then to such only child; and in case of the death of any other of the children without leaving lawful issue, then such accruing share or shares shall again become subject to the same right, chance, contingency, or condition of accruer."

The testator left him surviving his widow and the six children named. The widow died in 1850. Hannah, the daughter, married in 1850 a Mr. Mason, and died in 1851, without leaving any issue.

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At the time of the testator's death his property was invested in various securities.

The trustees did not, during the life of Hannah Mason, pay to her, or to any other of the children, any sum in respect of the testator's bequest to them; and the securities in which the testator's property was invested were not realised till after her death; so that she never received her portion.

On the death of Hannah Mason, her representatives having claimed one-twelfth of the proceeds of the testator's estate for her share, the trustees paid it into Court under the Trustees Relief Act; and this petition was now presented by four of the other children, claiming it for themselves and the remaining child, to the exclusion of Hannah's representatives.

Mr. Bacon, for the petitioners, contended that they, as survivors, were entitled; that the testator expressly provided for the event of any child not receiving his portion, and in this event, which as to Hannah had happened, the share of that child went over. [He cited *Elwin v. Elwin* (1), *Law v. Thompson* (2).]

Mr. Follett, and *Mr. T. B. Allen*, for the representatives of Hannah, were not called upon.

THE VICE-CHANCELLOR :

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What the testator meant was this: He directed his widow to have the income during her life. There is no other direction or disposition till her death: after her death he directs the payment

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of one moiety to his son William, and of the other moiety to his other children ; and after the direction to invest Jane's share, comes the proviso. Now this is merely a direction not to pay and divide the shares till the death of the widow ; not, as in *Elwin v. Elwin*, a postponement of the division till the completion of a sale. Then the testator refers to the time at which the petitioners would be entitled to receive shares, not to the time of actual receipt. (His Honour commented on *Law v. Thompson*, distinguishing it from the case before him, and proceeded.) It appears to me, without at all infringing or disagreeing with those cases, that what the testator here meant to refer to was not the period of the fund actually getting into the legatee's hands, but the happening of the event on which she would be entitled to receive it. I must decide, therefore, that Hannah's legal personal representatives are entitled to a share.

1853.
March 3.

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V.-C.
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WIDDICOMBE v. MULLER.

(1 Drewry, 443—447 ; S. C. 22 L. J. Ch. 614 ; 1 W. R. 223.)

A testator gave Long Annuities to A. for life, and if she died without leaving issue her surviving, then to B. and C., to be paid to them at twenty-one, if both living ; but if either should be then dead, then to the survivor. B. and C. both attained twenty-one, but died in the lifetime of A., who died without issue : Held, that the word " then " had reference to the death of A. without issue ; and that the residuary legatee, and not the representatives of B. and C., took.

HENRY SYMONDS by his will gave to his executors 20*l.* Long Annuities upon trust, for the maintenance and education of Harriet Hawkins till she should attain twenty-one, and then upon trust to pay such annuity to her for life for her separate use ; and after her decease to pay such 20*l.* Long Annuities for the maintenance and education of all or any child or children she might leave her surviving, share and share alike ; if more than one, during their respective minorities ; and on his, her, or their attaining twenty-one, upon trust to assign the annuity equally between them, if more than one, and if but one, the whole to such one. " But if the said Harriet Hawkins shall die without leaving any lawful issue her surviving, or, leaving any such, he, she, or they shall die under the age of twenty-one years, then upon further trust to pay and apply such annuity of 20*l.* per annum Long Annuities towards the maintenance and education of Robert Hawkins and Elizabeth Hawkins, the brother and sister of the said Harriet Hawkins, in equal moieties during their respective minorities ; and

upon their respectively attaining the ages of twenty-one years, upon trust to assign and transfer such annuity of 20*l.* per annum Long Annuities equally between them, if both living; but if either of them shall be then dead, then upon trust to assign and transfer the whole of such annuity of 20*l.* per annum Long Annuities to the survivor of them the said Robert Hawkins and Elizabeth Hawkins, for his or her absolute use and benefit, discharged of all further trusts concerning same.”

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Harriet Hawkins died without having been married; Robert and Elizabeth both attained twenty-one, and died in the lifetime of Harriet Hawkins.

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The question was, whether the representatives of Robert and Elizabeth took any interest, or whether the 20*l.* Long Annuities passed to the residuary legatees.

Mr. Hardy and *Mr. Pownall*, for the representatives of Robert and Harriet Hawkins :

The words “if both living,” and “but if either of them shall be then dead,” are to be read, if both live to attain twenty-one; but if either die under twenty-one, then to the survivor. The word “then” after the limitations to Harriet and her children, refers to the event, not to the time: the testator did not mean by the words “if both living,” to point to the being living, but to both being living. He had given the fund to both; and then, to provide, in the event of one dying under twenty-one, against the possibility of the representatives of that one taking, he adds the words “if both living,” preceding the limitation over to the survivor. If the word “then” is referred to the time of Harriet’s death, the effect would be to make the survivor of Robert and Elizabeth take, although under twenty-one, when it is clear the testator did not mean either to take till twenty-one.

Mr. Follett and *Mr. Hodgson*, for the residuary legatees :

The effect of *Mr. Hardy’s* argument is to strike out altogether the words “if both living.” The gift is of the *corpus* of the fund, the annuities themselves.

The true construction is, if both survive Harriet, they *are both to have the fund; if one only survives her, he or she is to have it: the event of neither surviving is not contemplated; there is no gift in that case; and that event having happened, the fund falls into the residue.

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Mr. Hardy, in reply.

THE VICE-CHANCELLOR:

There is great difficulty in ascertaining what the testator meant. The will appears to have been carefully drawn, and by a professional person.

The terms used in the particular gift for my consideration cause this dilemma. You must either apply the word "then" in the passage following "if both living," not to the immediately preceding passage in the will, but to a passage antecedent and at some distance; or you must give to it a meaning quite inappropriate. One thing is clear: both the passages must be referred to the same contingency. If the words, "if both living," refer to living to attain twenty-one, then the words, "if either of them shall be then dead," must mean, if either die under twenty-one. I think, however, that it is impossible to say that that can be the meaning of the words.

In another part of the will there is a gift of a sum for life, with remainder over, and there the word "then" is used clearly as referring to a period of time: that is the only place in the will where the word is so used.

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The natural meaning of the word is to refer to a time. Now the words, "if either of them shall be then dead," treating the word "then" as referring to a particular time *cannot refer to dying under twenty-one. But if you attribute the word in both sentences to the period of the death of Harriet without leaving issue surviving, then you are using the term in its natural sense. The difficulty is, that you are then going back to a period of time referred to in an earlier part of the case, instead of to a period referred to in the part more immediately preceding. I must, however, choose between the two difficulties. And the lesser of the two, is to attribute the words to the time of Harriet Hawkins dying without leaving issue.

I think what the testator meant was this: If the event happens, and when the event happens, of Harriet dying without leaving issue, &c., then I make a disposition, if both Robert and Elizabeth survive her, in equal shares to both; but if either of them be dead at that period, then the gift meant for both, if both were living, is to go to the survivor. In the events that have happened, I think the residuary legatee is entitled.

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(1 Drewry, 447—459; S. C. 1 W. R. 241.)

1853.

Jan. 25.

KINDERSLEY,
V.-C.

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A. being indebted to B. upon bonds, disputes arose between them as to what was due; and by an order in a suit, referring it to arbitration, and an award made under that order, the debt of A. was fixed at 8,000*l.*, which was ordered to be paid in two sums on days certain; and if payment was not made, the securities were to be sold, and payment made out of the proceeds. The 8,000*l.* and the surplus was to be paid to A.; no mention was made of interest. The securities were not, by reason of various transactions, realized for a very long time: Held, that the produce of the securities was not, as against subsequent incumbrancers of A., chargeable with more than the principal sum of 8,000*l.*

In March, 1818, Newnham was in possession of a *post obit* bond and a warrant of attorney from Cross, to secure 21,000*l.* and interest.

In April, 1818, Newnham assigned this bond and warrant of attorney to Mence, to secure 7,000*l.*; six common money bonds, to raise in all 17,200*l.*, were subsequently given by Cross to Newnham.

In July, 1818, Newnham delivered these six bonds to Mence, and at the same time entered into a deed poll, whereby he appointed him his attorney to sell the six bonds to secure the monies then due by Newnham to Mence.

In 1819, Newnham filed his bill against Mence to set aside the assignment of the *post obit* bond, and for an account of the dealings and transactions between them. An order was made in that suit on the 11th July, 1820, the material parts of which were as follows: It was ordered that it should be referred to A. Cullen to take *an account of the dealings between Newnham and Mence to the time of the order, and to settle and determine the matters in difference. That the sale of the *post obit* bond should be given up; and if the arbitrator should find any balance to be due from Newnham to Mence, he should in his award order the same to be paid at such place, and within such time, and as he should think proper; and should direct that in case of default in payment, the securities in the possession of Mence, or a sufficient part thereof, should be sold within such time and in such manner as the arbitrator should fix and determine; and that the money to arise from such sale, or to be otherwise produced from the securities, should be applied as the arbitrator should direct; the *post obit* and other bonds, and the evidences of the judgments were to be placed in the hands of certain bankers, and a deed of assignment of them was to be prepared to trustees, in trust, after the arbitrator should have made his award, to sell the

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securities and apply the produce as the arbitrator should direct, or to deliver them up to Newnham if no sale should be requisite, and generally as the arbitrator should direct.

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The bonds, &c. were deposited with the bankers, and an assignment of them to Collett and Serjeant upon trust was duly entered into, dated the 12th July, 1820. The trusts declared of the produce of the sale were, in the first place, to pay and discharge the costs, &c. of Collett and Serjeant and the bankers; and as to the residue, after payment of such costs, for such trusts, intents, and purposes as should be directed or declared by the award, to be made pursuant to the order of reference. The bankers were to retain the bonds and warrants of attorney until they should be paid off, discharged, or sold, or should be delivered up under the trusts thereafter declared. And it was provided, that if the arbitrator *should award that there was not any balance due from Newnham to Mence, or if such balance so awarded should be duly paid according to the award, or so paid that there should be no occasion to resort to a sale of the securities, then the securities should be delivered up to Newnham, as the arbitrator should direct. There were the usual trustee clauses, and a power to appoint new trustees in the place of Collett and Serjeant.

On the 26th March, 1821, and before the arbitrator made his award, Mence became bankrupt, and Owen became his assignee.

On the 22nd January, 1822, the award was made; and the arbitrator found that Newnham was, at the date of the order of reference, indebted to Mence, and was, at the date of the award, indebted to his assignees in the sum of 8,000*l.* upon the general balance of accounts; and he ordered that Newnham should pay to the assignees the said sum of 8,000*l.* in manner following: 3,000*l.* on the 12th of February then next, at the office, situate in &c., of Gillibrand, the solicitor of the assignees, and the sum of 5,000*l.*, the residue, at the same place, on the 1st of August then next.

And upon payment of the 3,000*l.*, as directed, he ordered that the bankers should deliver the *post obit* bond for 21,000*l.* to Newnham, and that, on payment of the 5,000*l.*, the bankers should deliver up the remainder of the bonds. And he ordered, that in case Newnham should fail or neglect to pay the 3,000*l.* and 5,000*l.*, then that the bonds, &c., or such of them as should remain in the hands of the bankers, or a sufficient part thereof, should be sold forthwith, subject to the trusts mentioned in the deed of 12th July, 1820. And he ordered, that, *upon the sale of the bonds, or part

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thereof, being made and completed, the bankers should, out of the monies which might come to their hands by the sale, pay to the assignees of Mence so much of the 8,000*l.* as should then be unpaid, and pay the residue of the said monies to Newnham, and should at the same time deliver up to Newnham such of the bonds, &c. as should then be remaining in their hands unsold.

Payment of the 8,000*l.* never was made by Newnham, nor was any sale ever made of the securities.

By a deed dated the 4th July, 1822, to which the father of Cross (the maker of the *post obit* bond) and others were parties, certain estates were conveyed to trustees, on trusts for sale and mortgage to raise money to pay the debts of Cross, and there were ultimate trusts for the benefit of Cross and his issue.

The father of Cross died in August, 1822, and thereupon Cross assumed the name of Legh.

In November, 1822, the trustees of the deed of 4th July, 1822, agreed to admit that there was due to Newnham from Thomas Legh (formerly Cross) 14,200*l.*; and by a subsequent deed of the 21st November, 1822, they signed three debentures in favour of Newnham, to the extent of 14,202*l.*

The trustees of the deed of 4th July, 1822, being unable to agree as to the management of the trust property, one of them in the year 1823 filed a bill against the others, and against the *cestuis que trust*, and against, among others, Newnham, but to which Collett was no party, for carrying into effect the trusts of the deed of July, 1822. This was the suit of *Drever v. Maudesley*, and in that suit an injunction was obtained.

Various proceedings were taken in this suit, occupying a very considerable time, viz., till 1849, in the course of which various orders were made, and directions given touching the claim of Newnham upon Legh, formerly Cross.

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In May, 1849, the present suit was instituted by Collett, (afterwards replaced by Derbishire, the present actual plaintiff,) the trustee of the deed of 11th July, 1820, stating all the foregoing facts, and stating, among other things, that Newnham had created a variety of incumbrances on the bonds and securities; and the object of the bill was to have the rights and priorities of the incumbrancers ascertained and paid.

The cause came on to be heard with two other causes, one of which was by Owen, affecting the same questions, or some of them; and on the 6th May, 1852, a decree was made in the three causes,

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referring it to the Master, among other things, to inquire what were the charges and incumbrances on the funds in question in the causes, and to state their priorities, and to state what was due in respect of such incumbrances.

In December, 1852, the Master made his report, and by it he found that Newnham was, at the date of the order of reference, in August, 1821, indebted to Mence, and was at the date of the report indebted to Johnson and Owen (Mence's assignees), in the sum of 8,000*l.*, on the general balance of accounts: and he ordered the same to be paid in given sums at given places; and after giving consequential directions consistent with the award, he concluded thus: "I find that the said S. Owen is the first incumbrancer on the funds in these causes, subject as aforesaid, (as to certain costs, &c.,) and that there is *now due to him, under the before-mentioned award, the principal sum of 8,000*l.*; but I am of opinion, that under the said award, the said S. Owen is not entitled to any interest on the said principal sum of 8,000*l.*, and I have therefore disallowed the claim made by the said S. Owen, so far as regards interest."

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The other material matters which appeared upon the report are noticed in the judgment.

To this report Owen excepted as to interest, contending that the Master ought to have allowed interest on the 8,000*l.*, at 5*l.* per cent., from the respective times when the instalments were directed to be paid by the award.

The exceptions now came on to be argued.

Mr. Chandlee, for Owen the exceptant:

The Master has found that Owen is entitled to 8,000*l.* but to no interest. That is wrong on three grounds:

Firstly. The debt carries interest of its own nature.

Secondly. If it does not of its own nature, Owen is entitled to interest, on account of the obstructions that have been interposed in the way of his getting his debt.

Thirdly. Interest is payable by reason of the nature of the security.

On the first point, [he cited *Johnson v. Durant* (1) and *Attwood v. Taylor* (2).]

On the second point, he cited *Grant v. Grant* (3).

(1) 36 R. R. 791 (4 Car. & P. 327). (2) 56 R. R. 344 (1 Man. & G. 279). (3) 27 R. R. 135 (3 Russ. 598).

On the third point, he cited *Barnett v. Sheffield* (1).]

Mr. Hallett, with him, [cited *Upton v. Lord Ferrers* (2), *Churcher v. Stringer* (3), *Atkinson v. Atkinson* (4), *Meredith v. Bowen* (5), and other cases].

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Mr. Glasse and Mr. Faber, for Clark and Squire, incumbancers, argued, that admitting the award might create a liability in Newnham personally to pay interest, it created no lien for interest upon the securities. As to the alleged obstructions, Newnham had nothing to do with them. The suits were not his, and he had no control over them. [They cited *Churcher v. Stringer* (3), *Booth v. Leycester* (6), *Martyn v. Blake* (7), and other cases.]

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Mr. Bagshawe, for Pearce and Stone, other incumbancers.

Mr. Selwyn, for Wade, the plaintiff in the third suit.

Mr. Teed, Mr. Roche, and Mr. Shebbeare also took the objection, that the Statute of Limitations, 42nd section, applied and barred more than six years' interest.

Mr. Cairns and Mr. Gifford appeared for other parties.

Mr. Chandless, in reply, on the Statute of Limitations, *said the fund was assigned on express trust for them, and the statute, of course, would not run.

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THE VICE-CHANCELLOR:

March 5.

This came before me on exceptions taken to the Master's report, on the ground that he has not allowed interest on a sum of 8,000*l.* awarded to be due from Newnham to the assignees of one Mence.

In argument, many matters have been alluded to which I throw out of consideration, as they were not before the Master, and are therefore not before me. All that was before the Master was the following list of proceedings: An order in the cause of *Newnham v. Mence*, dated July, 1820; a deed of submission to arbitration; an order in a supplemental suit dated August, 1821; the award of

(1) 91 R. R. 122 (1 D. M. & G. 371).

(2) 5 R. R. 167 (5 Ves. 801).

(3) 36 R. R. 745 (2 B. & Ad. 777).

(4) 12 R. R. 20 (1 Ball & B. 238).

(5) 44 R. R. 81 (1 Keen, 270).

(6) 44 R. R. 75 (3 My. & Cr. 459).

(7) 61 R. R. 27; see p. 31 (3 Dr. & War. 125, 138).

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Cullen, the arbitrator; two deeds endorsed on the submission; an order on further directions in a cause of *Drever v. Maudesley*; and the Master's report in that cause. From these documents the following facts appear.

(The VICE-CHANCELLOR then stated the facts, observing as he proceeded, upon the award, that the arbitrator having a discretion whether interest should be allowed on the items of account and on the balance, determined that interest should not be allowed; that he found a balance of 8,000*l.* due on the 4th of August, 1821; that he found that same sum due at the date of his award; and he directed part of the same sum without interest to be paid in February, and the remainder at a later period, still without interest; and he directed that in case these sums should not be so paid, there should be a sale of the securities, which, of course, could not take place without some time elapsing; and when the securities were realised he directed payment simply of the principal.)

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The VICE-CHANCELLOR then proceeded: On these facts and instruments, it appears to me that the contract of the parties is decisive of the case. Considering the order of July, 1820, together with the deed of submission, and the subsequent order and award, they come to this in effect: that the parties have agreed that the amount due from Newnham to Mence should be taken at 8,000*l.* without interest, and should be paid out of the proceeds of the securities not yet realised. I cannot vary that agreement, and say, that because there has been delay, the cause of which I do not know, I am to alter the contract. When the parties entered into it, they must have known that after the award was made, considerable time must elapse before it could be known whether there was any necessity for selling; and yet that was their determination. Again, time must elapse before there could be a sale or realisation of the securities. The parties must have known that, and yet their contract is, that when the money is paid, it is to be paid without interest.

But then it is said, this is a case in which the 8,000*l.* was awarded to be paid on two certain days; and that, where money is secured by any instrument to be paid on a day certain, then, from the time when the money ought to be paid, interest runs. No doubt there is such a rule to this extent, that if the creditor chooses after the day to bring an action, he may recover interest from that day; so here, the arbitrator having awarded 8,000*l.* to be paid on a

certain day, and 5,000*l.* to be paid on a certain other day, if, after the expiration of those times, Mence had brought actions against Newnham, I do not say that he would not have been entitled to interest.

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But here the question is, What is the contract with *reference to the right of Mence's assignees against the securities? That is the real question; not whether the debt might have been recovered with interest, but the agreement of the parties as to the securities, and their proceeds; they have said those proceeds shall be applied in payment of the principal, without interest. The right to bring an action against the debtor personally, cannot give a better right against the securities, than the contract has given. Therefore, the circumstance that the money is awarded to be paid on days certain, does not affect the question, What is the benefit of the securities?

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Another ground that has been argued is, that Newnham's conduct has been such as to render him liable for interest, and that those who, as his incumbrancers, claim in his place, have the same liability. The answer to that argument is, that whatever may be the effect of Newnham's conduct, I do not judicially know anything about it. It is said that Newnham converted the bonds into debentures, and that he had no right to do so. Whether he did do so or not, I do not judicially know. Then again it is argued, that the conduct of Newnham in getting an injunction, is another ground for altering the contract about interest. The answer is, nothing of that appears upon the report; I cannot judicially know anything about it.

Another ground taken is, that the sums recovered have been so on the bonds; and that the bonds have actually borne interest. No doubt that is so, and a large sum has been recovered for interest; but that cannot make any difference: it was known to the parties that the securities would bear interest; that, if realised, they would be realised with interest. And with that knowledge they left the matter to arbitration on the terms to which I *have referred, and the arbitrator has decided that no interest is payable.

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On the whole, the conclusion to which I come is, that the Master is right, and the exceptions must be overruled.

1853.
March 12.

TAYLOR v. AUSTEN.

(1 Drewry, 459—465.)

A testator gave property to his trustees, upon trust to pay, distribute, and divide equally between his daughters, naming them, to be paid and assured to them as they should attain the age of twenty-one, or be married under that age with the consent of his trustees. Proviso, that if they should marry with the consent of his trustees, he empowered the trustees to pay the shares at the times of such marriages, or at their discretion to settle the same:

Held, that the trustees had no power to direct a settlement where one of the daughters married under twenty-one without consent.

[This case scarcely requires a report.]

1853.
March 11, 12.

EX PARTE WISE. IN RE THE LONDON CONVEYANCE COMPANY.

(1 Drewry, 465—473.)

Under the old Winding-up Acts, where a Company was insolvent, but there was an arrangement pending, by which the admitted debts would be cleared by a subscription among the shareholders, and there were no other questions except equities between the shareholders, the COURT refused a winding-up order on the petition of a few shareholders holding very few shares, and ordered the petition to stand over, pending the arrangement, until the first day of the next Term.

[The discretionary power of the Court in these cases is extended under more modern Acts. See ss. 86, 91 and 149 of the Companies Act, 1862.]

1853.
Jan. 14.

PENNEY v. GOODE.

(1 Drewry, 474—476; S. C. 17 Jur. 83.)

KINDERSLEY,
V.-C.
[474]

Defendants will not be ordered to produce documents which they have no right to produce without the consent of some other person who is not before the Court.

In this case the bill was filed by Henry Penney against Goode, Burchell, and Bailey, who were the treasurers and trustees, and also members of the Westminster Fire Insurance Society. The plaintiff was a varnish manufacturer, and had insured in the Westminster Fire Office, under a policy dated the 12th of October, 1849, certain buildings and stock in trade used in his business, for the sum of 1,875*l*. In July, 1850, part of these buildings and the stock contained therein were destroyed by fire. And the bill was to have the amount at which these things were insured paid to the plaintiff.

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The office refused to pay the amount claimed, without being first furnished by the plaintiff with an inspection of his books and other vouchers and evidence, pursuant to the 12th condition of the policy; and this the plaintiff refused, on the ground that his method of manufacturing was a secret, and his books would disclose such secret. The 12th condition of the policy was as follows: "All persons insured who shall sustain any loss or damage by fire, shall forthwith give notice thereof at the office of the society, and within fifteen days after such fire deliver in the particulars of the loss and damage sustained, in the most satisfactory manner that the nature of the case will admit of; and shall, if required, verify the same by their oath or affirmation, and by the oath or affirmation of their shopmen, domestics, or servants, by their books of accounts and such other proper vouchers as shall be reasonably required in that behalf; and unless such notice shall be given and (if required) such affidavit of the insured's loss *made, and such books and vouchers produced, no money shall be recoverable by virtue of any policy to be issued by this society; and if it shall appear that there hath been any fraud or false swearing, or that the fire shall have happened by the procurement or wilful act, means, or contrivance of the insured or claimants, he, she, or they shall forfeit and lose every right and claim to restitution or payment by virtue of his, her, or their policy or policies; but in case any difference shall arise between this society and the insured, touching or concerning any loss or damage sustained, such difference shall be submitted to the judgment and determination of two arbitrators to be indifferently chosen, one to be named by the insured, and the other by the directors of this society; and in case such two arbitrators cannot or shall not agree, then the same shall be submitted to and determined by a third person to be chosen by such two referees or arbitrators as an umpire, and the award in writing of such two referees or their umpire shall be conclusive and binding upon all parties."

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This was the substantial question in the suit. The bill alleged that the defendants were the only parties necessary, and contained the usual inquiry for books and papers; and by their first answer the defendants, admitting that they were treasurers and trustees of the society, said they believed there were at the office of the said society, but not otherwise in their possession, custody, or power, &c., the deed of settlement in the bill mentioned, and the several letters in the bill mentioned, and divers other documents, of which, for

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reasons stated, they submitted they were not bound to set forth any schedule.

Afterwards a further answer was put in, by which they did set forth a schedule of these documents.

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The bill was afterwards amended, and by the answer to the amended bill, the defendants stated that they were no longer treasurers and trustees of the society, but that certain other persons whom they named, were such treasurers and trustees.

A motion was now made by the plaintiff for production of the deed of settlement, and of the documents mentioned in the schedule of the further answer. The defendants offered to allow inspection at their own office, but objected to produce them elsewhere, on the ground of inconvenience: the offer was refused.

Mr. Terrell, in support of the motion, cited *Glynn v. Caulfield* (1), and *Reid v. Langlois* (2).

Mr. Walford (with whom was *Mr. Malins*), cited *Taylor v. Rundell* (3), and *Murray v. Walter* (4).

Mr. Terrell, in reply.

The VICE-CHANCELLOR held, that the plaintiff was not entitled to production of the documents. He said, that if the defendants had been actually the trustees, still it did not appear by the answer that they had any power to take the documents out of the custody of the general body of directors. But it appeared they were no longer the trustees; other persons were as much entitled as they were, to say whether the documents should be produced or not; and if the Court made the order asked, it must, to enforce it, commit the defendants for not doing, that which they had no power of doing without the consent of other persons who were not before the Court. The motion was refused with costs.

1853.
April 26.

RICHARDSON v. JENKINS.

(1 Drewry, 477—483.)

KINDERSLEY,
V.-C.
[477]

A trustee under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it.

The words "covenant or agree" are not necessary in a trust deed to

(1) 87 R. R. 146 (3 Mac. & G. 463).

(3) 54 R. R. 227 (Cr. & Ph. 104).

(2) 84 R. R. 207 (1 Mac. & G. 627).

(4) 54 R. R. 232 (Cr. & Ph. 114).

constitute a specialty contract. A declaration by the trustee that he will stand possessed on certain trusts &c. is sufficient. RICHARDSON

A creditor by bond, in which the heirs are named, takes priority over a specialty creditor under a security in which the heirs are not expressly named. JENKINS.

THIS was a creditors' suit, for the administration of the estate of James Robertson; and it now came on to be heard on further directions.

Robertson had misapplied several trust funds, and the questions arose between the several cestuis que trust, who claimed as creditors against his estate. The plaintiff claimed under a deed by which certain property had been vested in Robertson on trust for sale; this deed contained such a declaration of trusts, as clearly created a contract by Robertson; but he had never executed it: he had, however, acted under it; he had sold the property, and received the money produced by the sale.

Davis, another creditor, claimed under two deeds, both of which were executed by Robertson.

The language of both of these deeds was, that it was declared that Robertson should stand possessed, &c., of the trust funds; but they did not contain the word "agree," and under one of them there were two trustees, Robertson and Snell. Snell survived Robertson.

Another creditor, Nicholson, claimed as a creditor by bond, in which the heirs were expressly bound.

The questions were, whether, firstly, the plaintiff was a specialty creditor; secondly, whether, in Davis' case, *the obligation did not survive to Snell, and whether, therefore, Robertson's estate could be sued; and thirdly, whether Nicholson had not priority over the others, as against Robertson's real estate.

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Mr. Selwyn and *Mr. C. P. Philips*, for the plaintiff, [cited *Lord Montford v. Lord Cadogan* (1), *Wood v. Hardisty* (2), and other cases].

Mr. Speed, for Davis, [cited *Adey v. Arnold* (3) and other cases].

Mr. Shapter, for Nicholson, [cited *Cummins v. Cummins* (4)].

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Mr. Selwyn, in reply. * * *

(1) 13 R. B. at p. 275 (19 Ves. at p. 638).

(2) 2 Coll. 542; see judgment, *post*.

(3) 95 R. B. 151 (2 D. M. & G. 433).

(4) 72 R. B. 29 (3 Jo. & Lat. 64).

RICHARDSON ^{v.} THE VICE-CHANCELLOR :
JENKINS.

[480]

In this case five points arise (1). The first relates to the debt due to the plaintiff. It appears that a trust deed was executed by which certain property was conveyed to Robertson on various trusts, one of which was a trust for sale, and he was to stand possessed of the proceeds on trusts, which it is not necessary minutely to mention. Robertson was a party to the deed and acted under it, but did not execute it; and the question is, whether that instrument, not being under the seal of Robertson, amounts to a contract on his part, so as to make his debt a specialty debt: a question which resolves into this, whether in such a case an action of covenant would lie at law.

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Now the circumstances of this case, and the *authorities cited in it, have brought to my recollection that when I was Master, the same question came before me, and these authorities, *Lord Montford v. Lord Cadogan* and the others, were cited; and as to the case of *Wood v. Hardisty* (2) entertaining doubt whether the decision went on the point of absence of execution of the deed, I caused the Registrar's book to be searched, and ascertained that the trustee had sealed the deed. In the case then before me, I decided that the debt was not a specialty debt. Of course I cannot treat my own decision, as Master, as an authority. But it appears to me now, as it did then, that it is difficult to comprehend how, except in a very few exceptional cases, a man can be liable as on a specialty debt, under an instrument not sealed by him. There may be cases of exception, as by the custom of London or by other custom, but such cases stand on the special custom. So in the case of a covenant running with the land, that stands on its own special ground, and is an exception to the general rule. As a general rule, a man cannot be bound as a specialty debtor, except by some instrument under his own seal; he cannot be bound as in a specialty by covenant, unless by an instrument under his own seal he has agreed to do something. If I found any authority deciding that acting under a deed, though not sealed by the party so acting, would render him liable as on specialty, I should be bound by it. If the case of *Wood v. Hardisty* had so decided, I should follow it. But I do not think that case, or any of the cases cited are applicable. *Lord Montford v. Lord Cadogan* was a case in which the

(1) The reporter has only thought it material to report the judgment on the four first points. The fifth related to the question of costs, and turned

on the particular course of conduct adopted by the plaintiff.

(2) 2 Coll. 542.

question was, not whether the trustee not having sealed the deed, was liable as on specialty, but whether, not having executed, he would be liable under the terms of the deed. The language of Lord ELDON is somewhat ambiguous; but though he uses the term "covenant," his *mind clearly was not addressed to that point. As to the case of *Wood v. Hardisty*, from examination of the Registrar's book, it appears clear that the trustee there had sealed the deed, and the question was, whether the language created a contract; the only case in which I find any authority is *Hawkins v. Sherman* (1), in which Lord TENTERDEN, though he does not expressly decide the point, intimates a doubt; but it is only a doubt (2).

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JENKINS.

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But supposing an action of covenant could be brought in that case, where a prior lessee has covenanted, and has then assigned his lease in such a manner that the assignee is under an obligation, the decision would only go the length that in that particular case an action of covenant would lie. *Adey v. Arnold* does not decide the point. Under these circumstances I am bound to decide on principle, and to hold, there being no authority to the contrary, that the want of sealing the deed by the party, prevents his debt being a debt on specialty. I am of opinion, therefore, that as to the debt due to the plaintiff, it is a simple contract debt merely.

The second question is this. Davis is a creditor under two deeds, of one of which Robertson is sole trustee; Robertson did execute the deed; the only question then upon this deed is, whether in form it is sufficient to constitute a contract; if there is a contract, Robertson, having sealed it, is a specialty debtor. The terms of the deed are "it is declared," &c.; and the question is, whether that amounts to a contract on the part of the trustee. On this point *Adey v. Arnold* was cited; and if Lord ST. LEONARDS had decided in that case, that, to constitute *a contract, it is necessary to have the word "agree," I should of course follow his decision. But he has not so decided. All that was decided in *Adey v. Arnold* is, that if there is nothing more than a conveyance on trust, that does not amount to a contract. And I am of opinion that when the parties to a deed, frame it in the terms of declaring that such and such things shall be done, the term "declare" is sufficient to constitute a contract. The case is the same as to the deed in which

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(1) 3 C. & P. 459.

it is rather to be collected that in such

(2) See also *Burnett v. Lynch*, 29 a case an action of covenant would
B. R. 243 (5 B. & C. 589), from which not lie.

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Robertson and another are the trustees. Davis, therefore, stands as a specialty creditor.

The third point is this. Under one of the deeds, Robertson was not sole trustee, but only jointly with one Snell. Robertson is dead, leaving Snell surviving him; and it is contended that though there is a contract under seal by Robertson, the obligation was joint, and that it survived to Snell, and lies on him and not on Robertson's estate; and *Richardson v. Horton* was cited on this point; the argument, however, assumes that the obligation was joint; but I think it was joint and several.

The fourth point is this. Nicholson is a creditor by bond under seal, in which the heirs are bound; and he claims to be paid first out of the real estate. Now the liability of Robertson under the deed which he executed to Davis, though a liability by specialty, is not one which binds the heirs; and the terms of the statute (3 & 4 Will. IV. c. 104) are clear. Nicholson is therefore entitled to be paid out of the real estate, in priority over Davis.

1853.
May 25.

EX PARTE HIGHT.

IN RE THE DOVER AND DEAL RAILWAY COMPANY.

(1 Drewry, 484—486.)

[An obsolete case as to the liability of a member of a provisional committee of a projected Railway Company for expenses incurred by the managing committee.]

1853.
May 6.

WAYN v. LEWIS.

(1 Drewry, 487—488.)

The Court had no power to order a sale under the 48th section of the Chancery Improvement Act, on interlocutory application, but only where, before the Act, foreclosure might have been decreed.

[A sale could not formerly be ordered on an interlocutory application in lieu of foreclosure; but now see the Conveyancing Act, 1881, s. 25, and see Ord. LI. r. 1.]

1853.
May 31.
June 4.

PARKER v. SOWERBY.

(1 Drewry, 488—496; S. C. 22 L. J. Ch. 942; 17 Jur. 52.)

KINDERBLEY,
V.-C.
[488]

A testator devised his real estate to trustees, with power to "let," until all his nephews and nieces should attain twenty-one. And after his youngest nephew or niece should be of age, then he directed his estates to be sold, and the produce to go amongst all his nephews and nieces, except two by name. He charged his rents with an annuity to A. and with

payment of bond debts, but did not otherwise dispose of them : Held, first, that the widow was put to her election.

Secondly, that the interests of the nephews and nieces vested in all who attained twenty-one, whether dying before or surviving the period directed for sale.

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THIS cause came on on further directions, [and the decision above mentioned as to the question of election stated in the head-note was affirmed by the full Court of Appeal in June, 1854, as reported in 4 D. M. & G. 341. The question whether that appeal requires a report is reserved until the report of the appeal is reached, but the decision as to the construction of the gifts to nephews and nieces may be conveniently reported here in its proper place.

The testator was seised of real estate, and possessed of personal estate, and he made his will, dated the 15th August, 1833, by which he bequeathed all his personal estate to his widow with a life annuity of 40*l.* a year, charged on certain real estate, and he appointed trustees under his will and gave certain lands into their hands to have power to let the same till all his nephews and nieces should be of the age of 21 years, and the will proceeded as follows :] “ After the youngest of my nephews and nieces is of age, then my will is, that the estates be sold by my trustees to the best advantage, and the price thereof to go equal, share and share alike, amongst all my nephews and nieces, Joseph Parker and John Pollock excepted ; should Margaret Parker be living, then my trustees to secure her 20*l.* a year during her life, and after her decease to be divided as above ; my trustees to take to themselves reasonable expenses for their trouble ; no wood to be cut or sold but what may be wanted for necessary repairs of the buildings, which I leave to the discretion of my trustees ; if my wife should have a child or children by me, born after my decease, this will is of no effect, as such child will be heir to all I have, and if more than one, share and share alike.”

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The testator died in 1837, and his will was duly proved by his widow.

The first question was, whether the widow was entitled to her dower out of the [estates devised. The report of this point is reserved, as above stated].

The second point raised in the case, was between nephews and nieces who had attained twenty-one, and were living at the time when the youngest attained twenty-one, and the representatives of nephews and nieces who had died under twenty-one, before that period, or having attained twenty-one, had died before that *period ; the question was whether the latter took vested interests.

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Mr. Bovill, for some of the parties, contended that those who were not living at the time when the youngest attained twenty-one, were excluded. [He cited *Beck v. Burn* (1).]

Mr. Taylor, for parties in the same interest.

Mr. Bagshawe, jun., for nephews and nieces who attained twenty-one, but died before the period of sale, [cited *Leaming v. Sherratt* (2).]

Mr. Glasse and *Mr. Murray*, for other parties, declined to argue the point.

Mr. Fleming, for other parties.

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Mr. Bovill, in reply :

* * Here the rents, during the minority of the youngest nephew or niece (subject to the annuities and debts), are undisposed of, and descend to the heir : that is not consistent with the immediate vesting of the remainder in the nephews and nieces. At any rate, those who did not attain twenty-one could not take vested interests. That is decided by *Leaming v. Sherratt*.

THE VICE-CHANCELLOR :

Assuming that both of the nephews and nieces who died before the period of sale attained twenty-one, I am of opinion that they are not excluded. This is a gift of real estate ; it is given to trustees in fee, and they are to have power to let till all the nephews and nieces of the testator shall have attained twenty-one. The testator is there speaking of all the nephews and nieces whom he should have at the time of his death. He gives to Margaret Parker 10*l.* a year to be paid out of the rents, and the other part of the rents he directs to be applied in payment of his debts. Then after the youngest of his nephews and nieces shall have attained twenty-one, he directs his estates to be sold, &c. (The VICE-CHANCELLOR referred to the particular language of the will.) *And then he directs, that if M. Parker should be living, she should have 20*l.* a year. Now if this were a limitation of the estate to the nephews and nieces, it appears to me it would be a vested interest in them, notwithstanding dying before the period fixed for sale and

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distribution; and it appears to me that the testator has only directed a sale, for the convenience of division.

Besides, I think there is this further reason for coming to this conclusion, viz.: that the testator, by excluding two of his nephews and nieces by name, shows himself, that except those two, he intended all his nephews and nieces to take. No doubt if a bequest is in these terms: "I desire that after a certain period my estate shall be sold," &c., the postponement not being for the convenience of the estate, the legatee must survive the period if he is to take. But if the postponement is for working out the purposes of the testator with reference to the estate, the interest will vest immediately.

I am of opinion that upon the authorities generally, this is a vested interest in the nephews and nieces who attained twenty-one, whether they did or did not survive the period at which the sale is directed. But if any of them did not attain twenty-one, such nephews and nieces did not (on the authority of *Leaming v. Sherratt*) take any interest.

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CANNOCK v. JAUNCEY (1).

(1 Drewry, 497—508; S. C. 1 W. R. 378.)

1853.
May 26, 28.

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A. was a transferee of a mortgage for 4,000*l.*, and claimed also under a judgment 880*l.* A bill was filed by a subsequent mortgagee to redeem the mortgage for 4,000*l.*, and for payment of the plaintiff's incumbrance in priority over the judgment debt. The bill alleged that A. had in his possession a deed of conveyance of the estate, in which was a recital that the judgment debt had been paid off. A. admitted the possession of the deed, and set out a portion of it, by which it was recited that the judgment debt was paid off; but he said that in fact this was only done for the purpose of clearing the estate, and that he had taken an assignment of the debt: Held, that if he had not been a mortgagee, he must have produced the deed; and 4,000*l.* having been paid to him, without prejudice to any question in the cause, held, that he could not set off 880*l.* of that as due to the judgment debt, but must be taken to be paid off as mortgagee, and therefore liable to produce the deed.

THIS came on upon a summons adjourned from the Judge's chambers to the Court, for production by the defendant Chichester of two deeds, one dated the 7th of July, 1846, and the other dated the 25th of July, 1846. The bill was filed by Ann Cannock, the

(1) Under s. 16 of the Conveyancing Act, 1881, mortgagees whose mortgages have been made since 1881 cannot refuse to produce the documents relating to their security to a mortgagor who is entitled to redeem.—O. A. S.

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wife of S. Cannock the younger, by her next friend, and S. S. Collins, against W. Jauncey, F. Higgins, C. M. R. Chamberlain, J. A. Higgins, W. Chichester, S. Cannock the younger, and other defendants.

The case made by the bill was, so far as it is material for the decision on this summons, as follows :

The defendants, F. Higgins and C. M. R. Chamberlain, were in and throughout 1846 the solicitors of S. Cannock the elder and S. Cannock the younger. In 1846 Cannock the elder was entitled to certain real estate subject to incumbrances. Higgins and Chamberlain were beneficially interested in some of those incumbrances, and were solicitors for all the other persons interested therein.

[498] It was arranged in 1846, at the instance of Higgins and Chamberlain, that Cannock the younger should purchase his father's property free from the incumbrances, for 6,700*l*. Not having money of his own sufficient, Higgins and Chamberlain undertook to procure for him 4,700*l*., provided 2,000*l*. could be procured by way of third mortgage, subject only to the 4,700*l*.

The plaintiff and another person since deceased, being trustees of a sum of 2,000*l*., advanced that sum by way of mortgage on the estates so purchased by Cannock the younger, on the faith of there being no other incumbrances upon them except the 4,700*l*., and the bill alleged that this was done in consequence of representations made by Higgins and Chamberlain. All the documents for these several securities were prepared by Higgins and Chamberlain.

The first mortgage for 4,000*l*., from Cannock the younger to Jauncey, was dated the 25th July, 1846, and it recited a deed of the 7th July, 1846, which was the conveyance by Cannock the elder and others to Cannock the younger. The second mortgage for 700*l*. was also dated the 25th July. The third mortgage for 2,000*l*. to the plaintiff and his co-trustee was dated also the 25th of July, 1846.

The defendant Chichester claimed to be interested in the mortgage for 4,000*l*. He claimed also to be entitled to a certain judgment debt for 880*l*. on the estates which were charged with the mortgages for 700*l*. and 2,000*l*., but of prior date to those mortgages ; which judgment debt had originally been vested in one Elizabeth Higgins, and had by transmission of interest become vested in Chichester.

[499] The bill then stated various circumstances, and among others that the indenture of the 7th July, 1846, to which Chichester and

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Elizabeth Higgins were parties, contained a recital in the words and figures or to the effect following: "Whereas the said S. Cannock the elder has this day paid to the said Elizabeth Higgins the said sum of 880*l.* and all interest for the same, as she doth hereby admit and acknowledge." The bill alleged that the said deed of the 7th July, 1846, "purported to show on the face of it, that the said Elizabeth Higgins had released the said judgment."

It then contained several charges, to the effect that the existence of the judgment debt had been purposely kept back by the defendants Higgins and Chamberlain, on the occasion of the advance of the 2,000*l.* by the plaintiff.

The plaintiff sought to redeem upon payment of the first and second mortgages for 4,000*l.* and 700*l.*, and for payment or foreclosure in respect of the plaintiff's mortgage for 2,000*l.*, and to stay an action of ejectment which had been brought by the defendants, to recover the property comprised in the mortgage deeds, and any other actions in respect thereof; in effect, to have the alleged judgment debt postponed to the plaintiff's demand.

The answer of Chichester admitted the deed of the 7th July, 1846, and stated with respect to it in substance as follows: "I have hereinbefore mentioned that the incumbrances upon the said estates and property, so as aforesaid sold by the defendant S. Cannock the elder to the defendant S. Cannock the younger amounting together to the sum of 7,880*l.* principal money, being a sum considerably exceeding the amount of the said purchase-money *for the same, but inasmuch as a portion of the amount of such incumbrances, viz., the sum of 1,500*l.* so as aforesaid secured to me, and the sum of 880*l.* so as aforesaid secured to the said Elizabeth Higgins, was secured not only on a portion of the property, so as aforesaid sold to the defendant S. Cannock the younger, but also on other property of the defendant S. Cannock the elder; and as to the said sum of 880*l.* by the judgment so as aforesaid entered up against the defendants S. Cannock the elder and S. Cannock the younger, it was arranged in or shortly prior to the said month of July, 1846, that I and the said E. Higgins should respectively join in conveying to the defendant S. Cannock the younger so much of the property comprised in our respective mortgages as was purchased by him, and that I should receive out of the said purchase-money the sum of 1,000*l.* only, part of my said mortgage debt of 1,500*l.*, and should advance and lend to and on account of the defendant, S. Cannock the elder, a further sum of money, which was ultimately fixed at

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1,392*l.*; and that, as a security for the repayment of the sum of 500*l.*, residue of the said sum of 1,500*l.*, and the said sum of 1,392*l.*, making together the sum of 1,892*l.*, together with interest for the same, all the property comprised in the said mortgages to me, and the said E. Higgins respectively, except the property so as aforesaid sold to the defendant S. Cannock the younger should be conveyed to me by way of mortgage; and it was further agreed that the said judgment debt, so as aforesaid due to the said E. Higgins, should be assigned to me for securing the payment of the sum of 880*l.*, part of the sum so to be advanced by me as aforesaid. In pursuance of the aforesaid arrangement, I and the said E. Higgins were respectively parties to the aforesaid conveyance to the defendant S. Cannock the younger, and joined in conveying such of the estates *comprised in our respective mortgage securities as were sold to the defendant S. Cannock the younger; and by an indenture dated the 7th July, 1846, and made between the defendant S. Cannock the elder of the first part, the defendant S. Cannock the younger of the second part, the said James Boulter of the third part, the said Elizabeth Higgins of the fourth part, the defendant J. A. Higgins of the fifth part, the said James Abell of the sixth part, and me William Chichester of the seventh part, after reciting (among other things) the said indentures, (stating several indentures,) and that the payment to the said E. Higgins of the said sum of 880*l.* and the interest thereof was further secured by two judgments of the Court of Queen's Bench, at her suit against the defendants S. Cannock the elder and S. Cannock the younger respectively, for the sum of 1,760*l.*, and that such judgments were respectively duly signed and registered in the month of June, and the registers thereof were respectively numbered 3,753 and 3,754, and also reciting the payment of interest by the defendant S. Cannock the elder to the said James Boulter and me William Chichester, in respect of our mortgages, and also reciting that the defendant S. Cannock the elder had paid unto the said Elizabeth Higgins all interest which had become due upon her said security for the sum of 880*l.*, and that the defendant S. Cannock the elder had then lately contracted with the defendant S. Cannock the younger for the sale to him of the hereditaments called respectively Taylors and Wineolls, and the said cottages and gardens at Elton, for the sum of 6,000*l.*, and that he the defendant S. Cannock the younger had on the day of the date of the indenture now in statement, and at the request of the defendant S. Cannock the elder, paid the sum of 1,200*l.*, part of the

said sum of 6,000*l.*, unto the said James *Boulter, in satisfaction and discharge of all monies due upon his said securities, and that the said James Boulter had concurred in the absolute conveyance to the defendant S. Cannock the younger, of the hereditaments sold to him as aforesaid. And after reciting that the defendant S. Cannock the younger had on the day of the date of the indenture now in statement, and at the request of the defendant S. Cannock the elder, paid the sum of 1,000*l.*, part of the said sum of 6,000*l.*, to me, in part of the said sum of 1,500*l.*, leaving only the principal sum of 500*l.* due upon my said mortgage security, and that I had concurred in the absolute conveyance to the defendant S. Cannock the younger of the hereditaments sold to him as aforesaid. And that in order that the said sum of 880*l.* might be paid to the said E. Higgins, and that other occasions of the defendant S. Cannock the elder for money might be supplied, I had consented to lend the defendant S. Cannock the elder the sum of 1,332*l.*, making with the sum of 500*l.* then already lent to him, the sum of 1,832*l.*, upon the repayment of the said sum of 1,832*l.* with interest being secured by the indenture now in statement, the said messuage or dwelling-house called 'Lamb and Flag,' and other hereditaments, were in consideration of the said principal sum of 500*l.* then remaining due from the defendant S. Cannock the elder to me, and in consideration of the sum of 880*l.* to the said E. Higgins, paid by me at the request and by the direction of the defendant S. Cannock the elder, and in consideration of the sum of 452*l.* to the defendant S. Cannock the elder paid by me, and for a nominal consideration to the said James Boulter and the defendant S. Cannock the younger, expressed to be paid by me, conveyed and assigned unto and to the use of me W. Chichester in fee, by way of mortgage for securing the repayment of the 1,832*l.* and *interest. And by the indenture now in statement, and in consideration of the said sum of 880*l.* to the said E. Higgins paid by me as aforesaid, the said E. Higgins, at the request and by the direction of the defendants S. Cannock the elder and S. Cannock the younger, assigned and set over to me, my executors administrators, and assigns, the said judgment and all benefit and advantage thereof, and all monies whatsoever secured by the same and all her estate and interest therein, to have, hold, enforce, recover, and receive the same unto me, my executors, administrators, and assigns, absolutely, for the better securing the repayment to me or them of the sum of 880*l.* part of the said sum of 1,832*l.*, and the interest of the said sum of 880*l.*, and for that

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purpose to sue out execution upon the said judgments when I or they should think fit; and the said indenture contained a power of attorney by the said E. Higgins, authorizing me in the usual manner to enforce the said judgments. The aforesaid sum of 880*l.* was in fact paid by me to the said E. Higgins on the 25th day of July, 1846, and the said sum of 452*l.* was also paid by me to or on account of the defendant S. Cannock the elder, at or about the same time."

In 1852 Chichester became transferee of the mortgage for 4,000*l.* to Jauncey.

The question was, whether he could be compelled to produce the mortgage deed to Jauncey, and the conveyance to Cannock the younger, both admitted by Chichester to be in his possession.

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A motion had been made in this cause in April, 1853, for an injunction to restrain the proceedings at law, and to restrain a threatened sale of the property mortgaged to secure the 4,000*l.* mortgage, on the plaintiff's paying *into Court the sum of 4,000*l.* and giving judgment in the action; and on this coming on, an order was made by arrangement, for payment to the defendant Chichester of the sum of 4000*l.*, he undertaking not to proceed with the sale, nor to sue out execution on the judgment, the order to be without prejudice to any question in the cause.

Mr. Bacon and Mr. Giffard, for the motion :

The deed of the 7th July, 1846, contains a recital that the judgment debt was paid off. That fact is material to our case; as the question is, whether the judgment debt is or is not subsisting, it is material that we should prove the existence of that deed at the hearing; we are therefore entitled to the production of it.

The only objection that could be made for one moment is, that a mortgagee is not bound to produce his deeds, for which *Browne v. Lockhart* (1), and *Neate v. Latimer* (2), will be cited; but these cases do not apply to this. This is like *Smith v. Duke of Beaufort* (3).

[They cited also *Balch v. Symes* (4), *Kennedy v. Green* (5), *Stanton v. Chadwick* (6), *Neesom v. Clarkson* (7). They said moreover, that the mortgage was in fact paid off by the payment of the 4,000*l.*]

(1) 51 R. R. 284 (10 Sim. 420).

(2) 47 R. R. 413 (2 Y. & C. Ex. Eq. 257).

(3) 58 R. R. 173 (1 Ph. 209).

(4) 23 R. R. 195 (1 T. & R. 87).

(5) 38 R. R. 69 (6 Sim. 6).

(6) 87 R. R. 202 (3 Mac. & G. 575).

(7) 52 R. R. 51 (2 Hare, 163).

Mr. W. M. James and Mr. C. Barber, for the defendant
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* * As to the recital in the deed of the 7th July, 1846, the fact of that recital is not in issue ; the defendant admits that it is contained in the deed : the plaintiffs have therefore by the answer all they can want. They rely on that recital as the only material part of the deed, and they have it admitted.

[They cited *Gill v. Eyton* (1), *Greenwood v. Rothwell* (2), *Crisp v. Platel* (3).]

Mr. Giffard, in reply :

* * The answer of Chichester is no evidence of the recital against the other defendants. We are not bound to read the answer as evidence ; but if the answer discovers material deeds, we have a right to their production.

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On the 28th May the VICE-CHANCELLOR delivered judgment :

This is a motion for the production by the defendant Chichester of two documents admitted by his answer to be in his possession ; and I think that as to one of them, viz. the deed of the 7th July, 1846, the plaintiffs are entitled to the production of it ; but they are not entitled to the production of the other deed. Putting aside for the moment the fact of the defendant Chichester having a mortgage, the question in the cause is simply whether a certain judgment debt vested in him is valid and subsisting, or whether it is at an end. The plaintiffs put their case on two grounds. First, they say the judgment debt is discharged,—actually released by the transactions which took place on the 7th July, 1846 : and next, that if it is not, the arrangements made between the person in whom the judgment debt was then vested, for the purpose of keeping it alive, were concealed from the plaintiffs, who were about to advance money on the estate, on the faith of there being no incumbrances except the 4,000*l.* and 700*l.* On neither of these questions can I now express any opinion ; I have only now to consider the case raised by the plaintiffs, in order to see how far the production of these deeds is material towards assisting them in making out their case ; I must assume that it is possible *that the plaintiffs may at the hearing be held entitled to the decree that they ask ; and they have a right to the production of any instrument which would show that title.

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(1) 64 R. R. 43 (7 Beav. 155).
(2) 64 R. R. 84 (7 Beav. 291).

(3) 68 R. R. 26 (8 Beav. 62).

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Now *prima facie* Chichester would be bound to produce the deed of conveyance of the 7th July, 1846; it does help to make out the plaintiff's title, for there is a recital in it which may with other circumstances afford ground for holding the plaintiffs entitled to the relief that they ask; but then the defendant Chichester is not merely a creditor, he is also a mortgagee; for in 1852 he took an assignment from Jauncey of the mortgage made to him on the 7th July, 1846, by Cannock the younger, and in his character of mortgagee he has a right to say, as mortgagee, I am protected. (The VICE-CHANCELLOR referred to the general rule as between mortgagor and mortgagee, that when the mortgagor comes offering to redeem, the mortgagee is not bound to produce his deed till he is paid. His Honour continued)—Now, nothing that I decide in this case is intended to contravene that rule; but here the plaintiffs have not only tendered, it seems, but paid to Chichester the mortgagee, the 4,000*l.* secured on his mortgage; and if there were no other claim, the mortgage is discharged. But then it is said, that the 4,000*l.* was not taken as a discharge of the mortgage. It is said by Chichester, "I did not take that in discharge of my mortgage, for I claim besides, 880*l.*, and I have a right to apply the money paid, first in payment of the judgment debt, and next in payment of the mortgage." It appears to me, however, that that is not a ground for refusing production of the deed. If, as I understand the case, the plaintiffs would have a right to production if there were no mortgage, the payment of the mortgage money prevents the defendant from saying that he has a right to refuse production.

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The defendant was ordered to produce the deed of the 7th July, 1846, but not the mortgage deed of the 25th July, as to which the COURT was of opinion that there was nothing to show that it could in any way assist the plaintiffs in making out their title.

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(1 Drewry, 508—513; S. C. 22 L. J. Ch. 888; 17 Jur. 706; 1 W. R. 378.)

An agreement conferring an option of purchase of land at a fixed price does not work a conversion until the option is exercised.

THIS was the petition of Bridget Walker.

It stated, that [by agreement dated the 21st of December, 1846, between the Shrewsbury and Hereford Railway Company, and Charles Walker, since deceased, the Company agreed with the said Charles Walker, that in case the Company should construct

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an intended railway, under the authority of a certain Act, they would pay to the said Charles Walker, for such (if any) of his said lands as they should take for the purposes of the said intended railway, after the rate of 500*l.* for every acre thereof, in addition to compensation for severance and other damage, according to the provisions of the said Act. And the said Charles Walker agreed to permit the said Company to take such (if any) of his said lands in the parish of Ashford Bowdler, as they should, within the period limited by the said Act for the compulsory purchase of lands, require for the purposes of the undertaking.]

Charles Walker died in 1847, having devised the lands in question unto John Williams and William Urwick and their heirs, * * to the use of the petitioner and her assigns for her life, * * with divers remainders over, with an ultimate remainder to the testator's right heirs. And the said testator appointed the petitioner and the said Charles Frederick Walker his executrix and executor. The said C. F. Walker had since alone duly proved the said will.

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The several devisees to whose issue the remainders were limited, except John Curwin Walker, never had any issue, and John Curwin Walker, then in Van Diemen's Land, the eldest son of the said testator, was, at the time of the said testator's death, and was then, his heir-at-law.

The Railway Company having occasion for five acres of the said land, forming part of the lands included within the limits of deviation referred to in the firstly above-mentioned Act, and also forming part of the estates and premises late of the testator Charles Walker, had recently and since the death of the testator contracted for *the purchase of the said five acres of land for the price or sum of 2,500*l.*, and had, in pursuance of such contract, entered into and were in possession of the said five acres of land.

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[The Railway Company, pursuant to their Acts, paid into Court the said sum of 2,500*l.*]

The petition prayed, that after payment of costs, &c., the residue of the 2,500*l.* might be invested, and the interest paid to the petitioner for her life.

The question was, whether the agreement of the 21st December, 1846, operated as a conversion of the real estate of Charles Walker, so as to make the money paid in by the railway go to his personal representatives, or whether it belonged to the real representative.

Mr. Chandless and *Mr. Eddis*, for the petitioner, contended that

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there was no conversion, but the money paid in by the Company went to the devisees of C. Walker.

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Mr. Fischer, for C. F. Walker, the executor of Charles Walker.

Mr. Kenyon, for the Company.

The following [among other] cases were cited: *Re Taylor's Settlement* (1), *Re Stewart's Estate* (2), *Townley v. Bidwell* (3), *Daniells v. Davison* (4), *Emuss v. Smith* (5), *Lawes v. Bennett* (6).

THE VICE-CHANCELLOR:

Assuming that I am bound by the cases cited, I do not think this case falls within them. I think this case turns on the construction of the contract, and is not within the authorities. The real meaning of the contract here is this: Both parties assume that the Company has power under the Act to take such land of Walker as it may think fit, within the limits of deviation; and therefore the Company does not ask Walker to contract to sell any land, but only to arrange beforehand the price per acre which the Company shall pay for such land of Walker (if any), as they shall take under the powers of the Act. And the contract arranges that price, and does nothing more. The terms of the contract show that to be its meaning. The Company had not made up their mind as to the precise line they would adopt. What is it that, under these circumstances, they contract for? Not that they will purchase any given quantity of land, but that, when they shall have determined on the construction of their line, and want *the land, they will pay to Walker, for such land as they shall take, 500*l.* per acre. There is no agreement for the purchase of land; the agreement is merely, that if they take any land under the compulsory powers of their Act, the amount to be paid shall not be determined by a jury, but shall be 500*l.* per acre.

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The contract is so made in terms by Walker. (The VICE-CHANCELLOR referred to the latter part of the contract, containing the express contract by Walker.)

It appears to me, that all that is the subject-matter of contract is the price of the land.

For these reasons, without adverting to the authorities, it appears to me that the money paid in, is not part of C. Walker's personal

(1) 89 R. R. 587 (9 Hare, 596).

(2) 1 Sm. & G. 32.

(3) 9 R. R. 352 (14 Ves. 591).

(4) 10 R. R. 171 (16 Ves. 249).

(5) 79 R. R. 346 (2 De G. & Sm. 722).

(6) 1 R. R. 10 (1 Cox, 167).

estate, but was at his death real estate, and continues to be real estate for the benefit of the persons entitled to his real estate; it will therefore go to the persons who are entitled to his real estate.

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The fund was directed to be invested accordingly, and the income to be paid to the petitioner, the devisee, for life.

MOODIE v. BANNISTER.

(1 Drewry, 514—520; S. C. 21 L. T. O. S. 148.)

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A bill was filed against A. and others, to set aside a deed of assignment by the plaintiff to some of the defendants, for fraud. The answer stated a subsequent deed, by which the plaintiff had assigned all her interest in the property to B., C., and D., in trust for creditors, and submitted that they ought to be parties. The plaintiff made them parties by amendment, alleging, but not proving, that they were out of the jurisdiction, in Scotland, and brought on the cause to a hearing, without bringing them before the Court:

Held, that the plaintiff having made these persons parties, they ought to be before the Court, if not out of the jurisdiction; and as to their being out of the jurisdiction, if they were so in fact, being only in Scotland, the plaintiff ought to have served them.

THE bill in this case was filed by Mary Anne Moodie, who claimed to be entitled, under the will of John Bannister, to one-third of his residuary real and personal estate, for the purpose of having the will carried into effect, and of having it declared that a certain deed was obtained by fraud and was void, or that it might stand merely as a security for what the plaintiff had received on account thereof.

The deed in question, dated the 22nd January, 1847, was alleged by the defendants, Esther Bannister, Sarah Ruth Bannister and Susannah Frances Bannister, to be an absolute assignment to them of the plaintiff's interest. The plaintiff alleged that it was intended only as a security for 200*l*. The answer of the Bannisters stated, that by an indenture of assignment and assignation, in the Scotch form, [dated the 14th of May, 1847, and made between the plaintiff of the one part, and Thomas Blackwood, George Clark and Robert Paterson, of the other part, the plaintiff assigned to the said Thomas Blackwood, George Clark, and Robert Paterson, their heirs and assigns, certain real estate therein described (1), subject and without prejudice to any mortgage, charge, or conveyance granted by the plaintiff to her sisters to hold the same unto the said

(1) It is not actually stated in the original report that this real estate included the property derived by the plaintiff under the will of John Ban-

nister, but the report appears to assume that the creditors' deed included that property.—O. A. S.

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Thomas Blackwood, George Clark, and Robert Paterson, their heirs and assigns, with power to sell the same,] but subject and without prejudice to any mortgage, charge, or conveyance, granted by said plaintiff to her sisters as aforesaid. But nevertheless, as to the whole of said property, upon the trusts and for the purposes thereafter mentioned and declared; which trusts were for the benefit of her creditors.

[518] On this cause coming on to be heard,

Mr. Daniell and *Mr. Tripp*, for the plaintiff, were about to open the case, when

Mr. Bacon and *Mr. Speed*, for the defendants *Esther Bannister* and *E. Ruth Bannister*, objected that *Boyes*, the trustee of the marriage settlement of *Mrs. Moodie* (1), and *Blackwood*, *Clark*, and *Paterson*, were not before the Court. The answer had insisted that the trustees of the creditors' deed ought to be parties. The bill was accordingly amended, and made *Boyes* and them parties; alleging, but not proving, that *Boyes* was out of the jurisdiction in *Van Diemen's Land*, and that the other three were out of the jurisdiction, viz., in *Scotland*, and this was admitted. But the cause was brought on without their being before the Court.

[*519] They submitted, that *Boyes*, as a trustee of *Mrs. *Moodie's* settlement, and the trustees of the creditors' deed, had an interest. As to the latter, if the defendants obtained a decree, that would not bind the trustees, who might file a fresh bill against them the next day. On the other hand, if the plaintiff was right in her claim, anything that might have to be paid by the defendants would be payable to the trustees of the creditors' deed, and not to the plaintiff personally, and the cause could not proceed in their absence.

Mr. Daniell and *Mr. Tripp* were heard *contrâ*.

Mr. Bristowe, for other defendants.

THE VICE-CHANCELLOR:

The question is, whether *Boyes* and three other persons,

(1) This settlement, dated the 18th September, 1828, comprised real estate in Australia belonging to the plaintiff's husband, *Affleck Moodie* (since deceased), and also comprised other property of *Mrs. Moodie* in England subsequently included by her in the

creditors' deed. The settlement was recited in the creditors' deed, and from that recital it appears that *Boyes* was a trustee of the settled property for the separate use of the plaintiff during her life under the settlement.—O. A. S.

Blackwood, Clark, and Paterson, parties to this suit, should now be present.

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As to Boyes, I do not think it necessary that he should; he is a mere trustee, having no interest.

As to the other three, the case is different. The plaintiff's bill was originally filed against other defendants (not making the trustees of the creditors' deed parties), to set aside a deed of the 27th January, 1847. The defendants say, that by a deed subsequent to that, viz., the deed of May, 1847, the plaintiff assigned over to Blackwood, Clark and Paterson, all her interest in the property, or at least some interest in it, and that a decree against the plaintiff would not bind those three persons; or supposing the plaintiff to succeed, and to be entitled to receive money, then that the money ought to be paid into the hands of Blackwood, Clark and Paterson.

That statement is made by the answer, which sets out, so far as is necessary to show the interest of these three persons, what the deed was, and it submits that they are necessary parties.

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The plaintiff amends her bill and adds them as parties. Surely this is a recognition of the justice of the defendants' requisition that they should be parties. If a defendant insists on certain persons being parties, the plaintiff must judge for himself whether they should be so made; the plaintiff here has exercised her judgment, and made them parties; therefore I think, being made parties, they ought to be here.

Then it is said that they are all out of the jurisdiction. Now if that be so, it ought to be proved, and it is not. But assuming it to be proved, they are only in Scotland; and ought not the plaintiff to serve them, under the course of procedure provided for that purpose by the rules of the Court, so that they may appear if they choose? If they were served, then one decree, whether adverse or favourable to the plaintiff, would relieve the defendants from further attacks.

I think the objection valid, and that I ought to yield to it.

WOODCOCK v. OXFORD AND WORCESTER RAILWAY COMPANY.

(1 Drewry, 521—530.)

A., B., and C. contracted with a Company to execute certain works on given terms. D. and E. gave a bond as their sureties for the performance of the contract. A. and B. retired from the partnership, and F. was substituted. Afterwards disputes arose between the Company and C. and

1853.
April 30.
June 8.

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F. as to the conduct of the works, and various transactions took place by which the terms of the contract were varied, and during which the Company paid to C. and F. certain monies which it had been agreed originally should be paid to A., B., and C. D. and E., the sureties, were no parties to these transactions, and gave no express consent; but they had been the solicitors of A., B., and C. in the original contract; knew of all the subsequent transactions, and acted as the solicitors of C. and F., and as such solicitors prepared many of the documents required for such transactions. The Company having brought an action on the bond against the sureties, for breach of the contract, they filed this bill to restrain the action: Held, that the sureties were not discharged, and that the action could not be stopped.

THE bill in this case was filed by Woodcock and Part, who had become sureties in a bond for 5,000*l.* to the defendants for the due performance of certain works relating to the making of a tunnel on the defendants' line, by Williams, Ackroyd, and Price, the original contractors for such work.

Disputes having arisen, the Company brought an action on the bond against the plaintiffs in equity, who thereupon filed this bill, and had obtained the common injunction.

The matter now came on, the answer being put in, on the plaintiffs showing cause against dissolving the injunction.

[*522] The case made generally by the plaintiffs was this: They said that the defendants, the Company, had so dealt with the principals, Williams, Ackroyd, and Price, *that they had discharged the plaintiffs from their liability as sureties. The facts on which the plaintiffs rested their contention were shortly as follows (1):

The contract for the performance of work for which the plaintiffs were sureties, was entered into in November, 1846, by three persons, Williams, Ackroyd, and Price on the one part, and the Railway Company on the other part, and by it Williams, Ackroyd, and Price contracted to do certain works in the construction of a tunnel, called the Mickleham Tunnel.

An agreed sum was to be paid to the contractors, of about 109,000*l.*; and, according to the contract, they were, as the work proceeded, to be paid from time to time such further sums as Mr. Brunel, the engineer of the Company, should certify to be payable to them.

The contractors were to purchase from the Company certain plant and machinery, for which they were to pay 10,000*l.*; so that the Company were to pay to the contractors the sums which the

(1) This statement of the facts forms part of the judgment delivered by the COURT. The reporter has transferred it to this portion of the report, to avoid repetition.

engineer should certify, and the contractors were to pay to the Company 10,000*l*.

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Contemporaneously with this contract, the plaintiffs, together with the contractors, executed a joint and several bond, dated the 4th November, 1846, by which they bound themselves to the Company in the penalty of 5,000*l*. for the due performance of the contract. This was, therefore, a simple suretyship for the performance of the contract. The works proceeded slowly, *and were, as the Company alleged, neglected. Thus things went on till December, 1848, when Ackroyd and Price desired to retire from the partnership, and an agreement was made on the 21st December, 1848, between Williams, Ackroyd, and Price (to which the Company were no parties), by which Ackroyd and Price retired, and all the benefit of the contract was given up to Williams. This was duly advertised, and as between them there was an end of the partnership. About the same time Williams entered into a partnership agreement with Marchant, by which it was agreed that they should carry on the contract. The Company was no party to this agreement.

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In May, 1849, the Company falling into embarrassment, and not having money sufficient to supply the continued execution of the works, applied to Williams and Marchant, desiring to know on what terms they would agree to suspend the completion of the works. Here they treated Williams and Marchant as the persons carrying on the contract. At that time Mr. Brunel had certified that 4,800*l*. should be paid to the contractors in respect of the work already done.

In answer to the application of the Company, Williams and Marchant wrote to the directors on the 30th May, 1849, offering to suspend the works on the terms that they were to receive the 4,800*l*., and that the Company should make certain other payments, to be ascertained, in respect of other matters not comprised in the engineer's certificate.

On the 12th June, Mr. Brunel wrote on behalf of the Company to Williams & Co., accepting the terms of their letter, and the works were suspended accordingly, *Williams and Marchant doing merely what was absolutely necessary to prevent injury by the suspension of the works.

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Differences then arose between the Company and Williams and Marchant as to what the Company was to pay in respect of the other matters not comprised in the 4,800*l*., and by an indenture of the 17th November, 1849, between the Company of the one

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part and Williams and Marchant of the other part, an arrangement was entered into to the effect that the matters in difference as to the sums to be paid to Williams and Marchant should be referred to the arbitration of Mr. Brunel, who was to take all the circumstances into consideration, and determine what was to be paid by the Company in respect of timber left on the works; what they were to pay further in respect of the suspension of the works, &c. All these matters were referred to Mr. Brunel, and he was to take into account the 10,000*l.* which Williams and Marchant had to pay to the Company in respect of the plant and machinery, which Williams, Ackroyd and Price had agreed to purchase from the Company. In pursuance of this submission to arbitration, Mr. Brunel made three awards.

The first was on the 19th November, 1849, by which he certified that 7,500*l.* were to be paid by the Company for items specified in the schedule to the deed of submission, and in respect of timber and plant left in the shafts, and which the Company were to pay for after setting off the 10,000*l.* which the contractors had agreed to pay.

In pursuance of this first award, debentures of the Company were given to Williams and Marchant, to secure 7,800*l.*

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The second award was made on the 21st November, 1850, and it awarded a further sum of 4,025*l.* 7*s.*, to be paid or secured to Williams and Marchant in respect of other portions of the matters in dispute.

Before the last award was made, it became necessary to extend the time, and two different deeds were executed, one dated the 19th May, and the other the 29th June, extending the time for Mr. Brunel to make his award.

On the 18th July, Mr. Brunel made his third award, and determined that 6,830*l.* was the amount the Company was to pay for the suspension of the works; and of this sum he ordered 1,330*l.* to be paid in Court in twenty-one days, and the remainder of it to be secured by debentures of the Company.

That was done, and the debentures were given. So matters remained, the contractors only doing what was necessary to preserve the works till March, 1851. But during that time Williams and Marchant had been urging the Company to determine about the remainder of the works, and urging that they ought to be paid farther sums, by reason of the continued suspension of the works, and the expenses they were put to; and, in order to settle these

differences, there was on the 6th May, 1851, another submission to the arbitration of Mr. Brunel; the works were to be continued, and Mr. Brunel was to determine what was to be considered as being paid by the 109,000*l.*, what other sum or sums were to be paid by the Company, and within that time the works were to be completed.

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The works being resumed, the Company considered *that Williams and Marchant were not proceeding with sufficient vigour, and on the 9th June, 1851, they served a notice on Williams and Marchant to proceed more effectually.

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On the 21st June, 1851, Williams and Marchant served a notice on Mr. Brunel, calling on him to proceed with his arbitration under the submission of the 6th March, 1851. The Company then considered it right to take possession of the works, on the ground that they were not proceeding, and they served notice, on the 21st June, 1851, on the contractors, that they should take possession, and meant to put the matter into the hands of other contractors. This led to hostile proceedings, which ended in an agreement of the 21st July, between Mr. Brunel on the one part, and Williams and Marchant on the other part, to give up possession to the Company, without prejudice to any question.

On the 21st August a deed of submission was prepared referring the matter to the arbitration of Mr. Cubitt, or some other engineer.

In the mean time, the contractors having become bankrupt, in June, 1851, an action had been brought by the Company against Woodcock and Part, the sureties for 5,000*l.*, on the ground of breaches of the contract, for which they sought to recover from the sureties, and then this bill was filed by Woodcock and Part against the Company.

Mr. Follett and Mr. T. H. Terrell, for the plaintiffs, showed cause :

* * It is said that the sureties knew of the transactions; but they knew them only in their character of solicitors; besides, the mere knowledge and even consent of the sureties to these changes would not renew their suretyship. They did not consent to their change of position as sureties. What they consented to, was to be discharged, as the proper consequence and effect of the transaction. [They cited *Calvert v. London Dock Company* (1) and other cases.]

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Mr. Malins and Mr. Rogers, for the defendants :

The several deeds referred to in these pleadings were *executed with the privity and assent of the plaintiffs. The deed of the 6th March, 1851, was prepared with their assistance ; they acquiesced, in fact, in the whole transaction, as attornies of the contractors ; and they are therefore not released. We do not dispute the general rule as to releasing sureties by changing their position, but that must be when they do not assent ; but here they have positively acted, and thereby assented, and then the rule does not apply.

*Mr. Follett, in reply. * * **

On the 8th of June the VICE-CHANCELLOR delivered judgment. After stating the facts his Honour continued :

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Now it is contended by the plaintiffs, that all these circumstances put together—first, the transfer of the contract to Williams and Marchant ; then, the Company dealing with Williams and Marchant as they did, entering into arrangements with them, altering the contract, the time at which it was to be carried into effect, the terms *and mode of payment to the contractors ; all these circumstances, they say, bring this case within the principle, that if a creditor so deals with his principal debtor as to alter the position of the surety, he discharges the surety.

But, as the defendants' counsel suggest, that principle applies only when the transaction is without the concurrence of the surety ; and the plaintiffs have felt the importance of that ingredient in the matter, that it must be without the concurrence of the surety ; for the bill contains again and again passages charging that the sureties knew nothing of the transaction,—were neither parties nor privies to any of the transactions subsequent to the giving of the bond. The whole of the equity of the bill is founded upon that.

Now, from the answer, and not merely by the statements of the answer, but by correspondence referred to, this appears : Woodcock and Part being in partnership as solicitors, with Scott, the firm being Woodcock, Part and Scott, were solicitors for Williams, Ackroyd and Price. They prepared the contract and the bond ; they continued to be the solicitors of the contractors when Ackroyd and Price withdrew, and Marchant was substituted ; they continued to act as the solicitors of Williams and Marchant ; they were the solicitors who assisted in the preparation, if not of every one, at least of most of the subsequent instruments ; and, to show beyond

doubt that the allegations of the bill, as to the transactions having taken place without the knowledge or concurrence of the sureties, have no foundation, correspondence is set out between the firm of Woodcock, Part and Scott, as solicitors for Williams and Marchant, with the Company, on the subject of the arrangements *by which all the matters in difference under the first submission were referred to the arbitration of Mr. Brunel, and by which the Company adopted Williams and Marchant as contractors, and dealt with them as such, being the very arrangements which the plaintiffs say discharged them.

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Under these circumstances, without going any further, I think the equity claimed by the bill rests on allegations wholly unfounded in fact. It does not rest merely on the statements of the answer, but it appears by the correspondence, not only that the transactions on which they rely for their discharge were known to the plaintiffs, but that they assisted, as the solicitors of the principal debtor, in the preparation of instruments for carrying into effect the arrangements of which they complain. I must therefore dissolve the injunction.

The costs were reserved to the hearing, if the suit should be prosecuted; if the suit should not come to a hearing, the plaintiffs to pay the costs of the motion.

WHITBREAD v. SMITH.

(1 Drewry, 531—547.)

[Reversed on appeal, as reported in 3 D. M. & G. 727, where a note will be found of the judgment of the VICE-CHANCELLOR in the Court below, which may be thought more in accordance with the previous authorities than the judgment of the Appeal Court.]

1853.
April 20.
June 11.

GROOM v. BOOTH.

(1 Drewry, 548—568; S. C. 22 L. J. Ch. 961; 21 L. T. O. S. 253.)

One trustee deposited title-deeds relating to his own property with his co-trustee (who was tenant for life under the trust) to indemnify her against loss and liability in respect of the improper sale of 1,000*l.* Bank Annuities (part of the trust fund), the proceeds of which sale (amounting to 1,020*l.*) had been received and misappropriated by him with her consent. He subsequently became bankrupt, and upon the application in bankruptcy of the solvent trustee and the assignees in bankruptcy of the bankrupt trustee, the property comprised in the deposited deeds was sold to a purchaser for 710*l.* under an order of the Court of Bankruptcy, subject to a condition that the purchaser should accept the receipt of the solvent

1853.
June 8, 10, 13.
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trustee as a sufficient discharge for the purchase money and should not require the concurrence in the conveyance of any other person than the solvent trustee and the assignees in bankruptcy of the bankrupt trustee.

The purchaser required the concurrence of the cestuis que trust, and the vendors offered to allow the purchaser to invest the whole of the purchase-money in Bank Annuities in the names of the two trustees :

Held, that the object of the deposit of title-deeds was to indemnify the solvent trustee against her liability in respect of her concurrence in the breach of trust, and not to secure the replacement of the trust fund, and therefore the receipt of the solvent trustee would discharge the purchaser, and that consequently the condition of sale was perfectly reasonable and proper (1).

And that even if the deposit of title-deeds had been made to secure the replacement of the trust funds, the order directing the sale was a necessary and proper order, and was valid and binding upon the cestuis que trust without any notice to them or any consent or concurrence on their part, and that the costs of the proceedings and sale were properly payable out of the purchase-money under the order, without bringing the cestuis que trust before the Court.

THIS was a special case for the opinion of the Court. It stated as follows : By a contract entered into on the 8th July, 1852, the defendant contracted for the purchase from the plaintiff of two freehold houses, with garden, &c., at the price of 710*l.*, subject to printed particulars and conditions of sale. To the said contract annexed, the sixth condition was as follows : " The property comprised in these particulars is sold by order of the Court of Bankruptcy, under the direction of the assignees of John Knight, a bankrupt, upon the petition of Elizabeth Hull, the equitable mortgagee, and it is hereby expressly declared, that inasmuch as the Commissioner has adjudicated upon the said petition, all the facts and allegations contained therein, or in the order of the said Commissioner made thereupon, shall be deemed and accepted by the purchaser as sufficiently and satisfactorily established, without any further evidence or proof whatsoever, nor shall any such be required. And the purchaser shall pay the amount of his or her purchase-money and interest, if any, agreeably to these *conditions, to the said E. Hull, whose receipt alone shall be a valid discharge for the same, and such receipt shall exonerate the purchaser from seeing to or being in any way concerned about the application or appropriation of the purchase-money, or any part thereof, and from all responsibility on account of the same, and that the only persons who shall be required to join or concur in the conveyance or

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(1) Presumably the condition of sale would not have been enforced if it had involved the purchaser in a breach of trust by requiring him to neglect any

duty to see to the application of his purchase-money ; but see *Wilkinson v. Hartley*, 92 R. R. 374 (15 Beav. 183), and the cases there cited.—O. A. S.

assurance of the property to the purchaser shall be the assignees of the said J. Knight and the said E. Hull."

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The defendant duly paid his deposit; but the purchase was not completed on the day agreed upon, and has not yet been completed; and the defendant, under the following circumstances, and subject to the declaration of this Court to be made in this matter, declines to complete the said purchase.

The plaintiffs are the assignees in bankruptcy of one J. Knight, who at and before the time of his making the deposit hereinafter mentioned of the title-deeds of the aforesaid houses and premises now contracted to be sold, was seised thereof in fee-simple in possession, free from incumbrances, and so continued (subject to the said deposit) up to the time of his bankruptcy hereinafter stated. That Samuel Hull, by his will, dated the 19th November, 1836, among other dispositions bequeathed to his wife Elizabeth Hull, the sum of 500*l.* stock in the then New 3*l.* 10*s.* per cent. Bank Annuities, part of the 3,950*l.* stock standing in the testator's name in the books of the Governor and Company of the Bank of England, for her absolute use; and the said testator by his said will afterwards proceeded in the words and figures following, that is to say, "I give and bequeath *unto my said wife Elizabeth Hull, the interest and dividends to arise and grow due on the sum of 2,500*l.* further part of the said sum of 3,950*l.* stock aforesaid, for and during her natural life; and from and immediately after her decease, I give unto John Knight, (thereby meaning the said above-named John Knight, since bankrupt as above stated,) his executors, administrators, and assigns, upon trust, all that principal sum of 2,500*l.*, equally to be divided amongst all my nephews and nieces then living;" [as therein specified]. And the said testator appointed his wife the said Elizabeth Hull and the said John Knight, since bankrupt, executrix and executor. Samuel Hull died on the 7th November, 1843, and left him surviving his widow Elizabeth Hull, and several nephews and nieces, of whom several are married women; and are still living; and on the 23rd November, 1843, the said will was duly proved by the said Elizabeth Hull and John Knight, in the proper Ecclesiastical Court. The 2,500*l.* 3*l.* 10*s.* per cent. Bank Annuities was transferred into the names of Elizabeth Hull and John Knight, upon the trusts of the will. Subsequently to such transfer, and in the month of March, 1844, Knight requested Elizabeth Hull to join with him in selling out *part of the said Bank Annuities, and to allow him to apply the proceeds to his own use, upon his giving to her his

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promissory note, and depositing with her, by way of equitable mortgage, the title-deeds of the said two freehold houses and premises, now contracted to be sold, of which John Knight was then seised in fee-simple; to which proposal Elizabeth Hull agreed. On the 14th March, 1844, Elizabeth Hull and John Knight joined in selling out 1,000*l.* stock, part of the said 2,500*l.* 3*l.* 10*s.* per cent. Bank Annuities, and the net proceeds of such sale, amounting to 1,020*l.* sterling, were paid to the said John Knight and applied by him to his own use. On the following day, John Knight gave to Elizabeth Hull his promissory note, dated the 15th March, 1844, for 1,000*l.* On the same day, he deposited with Elizabeth Hull the title-deeds of the said freehold houses and premises. At the time of making the deposit, John Knight also delivered to Elizabeth Hull a memorandum, dated the 14th March, 1844, which was signed by him, and was as follows: "March 14th, 1844. Memorandum. This is to certify that the title-deeds of the houses situated at Pomona Place, King's Road, Parson's Green, Fulham, lately occupied by Mrs. Wellman, deceased, and others, is placed in the possession of Mrs. Hull, to secure to her the payment of 50*l.* annually, for 1,000*l.* 3*l.* 10*s.* per Cents. drawn from the stock standing in her name and John Knight's, under the will of the late Mr. Samuel Hull, given to them in trust; and the said John Knight agrees to pay the above-named 50*l.* half-yearly unto Mrs. Hull, for which he has given a bill for the amount. Signed, JOHN KNIGHT. To Mrs. HULL, St. John's, Fulham." The said deeds were deposited for the purpose of securing and indemnifying Elizabeth Hull in *respect of the income and principal of the said trust-monies.

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No part of the principal sum of 1,000*l.* stock has been replaced or repaid by John Knight, but all interest in respect thereof, in lieu of the dividends thereof, has been duly paid up to the time of the bankruptcy of the said John Knight. On the 4th November, 1851, John Knight, with his nephew and partner, John Knight the younger, were duly adjudged bankrupts; and on the same day, the above-named plaintiff James Foster Groom was appointed official assignee, and the above-named plaintiffs Henry Hunt, Daniel Titmuss, and Richard Oakley, have also been duly chosen and appointed creditors' assignees of the estate of the said bankrupts. By an order of the Court of Bankruptcy, made on the 25th March, 1852, on the petition of Elizabeth Hull, stating such of the above-mentioned matters as had then taken place, (save that the said petitioner did not state who were the testator's nephews and nieces

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then, or whether they or any of them were or were not infants or married women,) and served on the plaintiffs as respondents thereto, it was ordered that an account be taken of the principal monies necessary to replace the said sum of 1,000*l.* 3*l.* 5*s.* (formerly 3*l.* 10*s.* per Cent.) stock, and of what was due to the said petitioner in respect of her life interest therein; and that, for that purpose, all necessary accounts should be taken, and that the said houses and premises, the title-deeds whereof had been so deposited as aforesaid, being the houses and premises now purchased by the said defendant, should be sold by and under the direction of the said plaintiffs, the assignees of the said John Knight, and that all proper parties should join in such sale, and in the conveyance thereof *to the purchaser or purchasers thereof; and that the monies to arise by such sale should be applied in the first place in payment of the costs and expenses of such sale, and incidental thereto, and in replacing the said 1,000*l.* 3*l.* 5*s.* per Cent. stock, and afterwards in payment of what should be found due to the said Elizabeth Hull, as aforesaid, for interest. And it was further ordered, that the costs of all parties, of and incidental to the said petition, should be paid out of the monies to be produced by such sale aforesaid.

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The cestuis que trust of the said sum of 2,500*l.*, 3*l.* 5*s.* per cent. Bank Annuities, other than the said Elizabeth Hull, were not served with and did not appear upon the said petition.

The said houses and premises were accordingly, on the 8th of July last, put up for sale by auction by the said plaintiffs, and with the concurrence of the said Elizabeth Hull, and in pursuance of the said order, at the Auction Mart, in the city of London, subject to the conditions hereinbefore referred to, when the defendant bid for and contracted to become the purchaser thereof, upon a good title being shown, in accordance with the conditions of sale.

Shortly after the said contract, and within the time limited for that purpose by the conditions of sale, the said defendant, by his solicitor, duly notified in writing to the plaintiffs or their solicitors, that he objected to complete his purchase, on the ground, that notwithstanding the conditions of sale, the purchaser must see to the application of the purchase-money; and he required that all the persons beneficially entitled in *remainder to the said sum of 2,500*l.* 3*l.* 5*s.* per cent. Annuities, under the will of the late Samuel Hull, if they were persons ascertained and *sui juris*, and also the bankrupts, should join in the conveyance.

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That, in answer thereto, the solicitors of the plaintiff, on the

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30th July last, by letter of that date, stated, as the fact is, that the said bankrupt would (if desired) join in the conveyance, and that no further objection is now raised by the defendant on that point.

That the said solicitors of the plaintiffs, in answer to the requisition of the said defendant, that the persons beneficially entitled in remainder under the said will should concur in the conveyance to the defendant, by the same letter stated, that it was intended to invest the balance of the purchase-money after paying the costs, in the joint names of the trustees under Mr. Hull's will, upon the trusts therein contained, of the said sum of 2,500*l.* stock, the said parties entitled thereto in remainder being unascertained, and, as to some of them, under disability, as hereinbefore mentioned.

[Further correspondence ensued, and eventually the plaintiff's solicitors, on behalf as well of the said plaintiff as of the said Elizabeth Hull, offered to the defendant that the whole of the said purchase-money should be so invested, and that the purchaser might if he desired at once make the investment himself, and recite the same in his conveyance. The purchaser, however, disputed the jurisdiction of the Court of Bankruptcy to sell the property in the absence of the *cestuis que trust* and ultimately, the special case for the opinion of the Court was agreed upon, and the questions were :]

[555] First. Whether, under the circumstances aforesaid, the receipt of the said Elizabeth Hull and the said bankrupt, in their character of trustees of the said will of the said Samuel Hull, is alone a sufficient discharge to the defendant for his aforesaid purchase-money, *without the concurrence in such receipt, or in the conveyance to the said defendant, of the persons beneficially entitled in remainder to the said sum of 2,500*l.*, 3*l.* 5*s.* per cent. Annuities, under the said will as above stated.

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Second. Whether, under the circumstances aforesaid, if the net purchase-money, after deducting the expenses of and incident to the sale, and the said petition and order, be invested by or with the privity and concurrence of the said defendant, in the purchase of Bank 3*l.* 5*s.* per cent. Annuities, in the names of the said Elizabeth Hull and John Knight, to be held by them on the trusts declared by the said will concerning the said sum of 2,500*l.* like Annuities, the said defendant, the purchaser, would not be discharged from liability to see further to the application of the purchase-money, without such concurrence in the conveyance to him of the said persons so beneficially entitled as aforesaid. And if the Court

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should be of opinion that such investment of the said purchase-money will not discharge the purchaser from such liability, then, whether, if under the circumstances aforesaid, the whole of the said purchase-money, without making any such deduction therefrom as aforesaid, be invested in the manner and upon the trusts hereinbefore mentioned, the said defendant will or will not be discharged.

Third. Whether, under the circumstances hereinbefore stated, such a title has been shown in the vendors, or offered to the purchaser, as this honourable Court would compel a purchaser to accept; and whether the purchaser is or not bound to complete his purchase, and specifically to perform his said contract, on one and which of the investments above-mentioned being made.

The case now came on to be argued.

Mr. Bacon and Mr. Hadden, for the plaintiffs.

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[They relied on the sixth condition, and the order in bankruptcy. The condition has been accepted by the purchaser, and whether originally a proper one or not, it is binding on the purchaser.]

Mr. Daniell [and *Mr. Martindale*], for the purchaser :

* * The land stands in the place of the original trust fund, the stock; and there is no power or authority in the bankrupt and Mrs. Hull to part with the land, if the cestuis que trust choose to adopt it as their trust property.

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* * * * *

The purchaser has notice that there was originally a breach of trust; he has also notice that it is intended to apply part of the purchase-money, in breach of the trust. He cannot safely pay the money under such circumstances on the receipt of the trustees. * * *

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The petition in bankruptcy, moreover, did not show to the purchaser that the trustees had no power to sell, and give receipts, nor that they had committed a breach of trust. The sixth condition of sale was fraudulent, because neither by itself nor connecting it with the petition, is it shown what was the true ground of the restriction. * * *

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Mr. Bacon, in reply :

* * Mrs. Hull is simply an equitable mortgagee, having a right to realise. The security was given to her alone, as her personal security.

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* * The order of the Court of Bankruptcy fastens on the proceeds the character of trust-money.

Franco v. Franco (1) is directly applicable. * * *

[562] THE VICE-CHANCELLOR :

In this case the question is, whether certain freehold estates which belonged to the bankrupt Knight, and which have been ordered to be sold by the Commissioner in bankruptcy, are in such a condition that a good title can be made ; or whether, if the title is not absolutely bad, it is at least so doubtful, that this Court will not force it on a purchaser.

[*563] That the Commissioner had power to direct a sale *of the bankrupt's estate properly so called, is not in controversy. But it is said this was not the bankrupt's estate, but an estate on which a trust was fastened, in consequence of the improper sale of trust stock vested in the bankrupt and Mrs. Hull as trustees, and the investment of the produce on the security of these premises ; and then it is contended that other persons besides the bankrupt had an interest in them ; and it is said that Mrs. Hull, on petitioning for the sale of the estate, ought not to have obtained the order for sale in the absence of the parties beneficially interested in the trust fund, the produce of which was invested on the security of this property ; and it is further contended, that even if the Commissioner had power to make the order, yet that a good title cannot be made unless all the *cestuis que trust* concur in conveying.

These are, I think, the objections made by the purchaser ; and if either of them is valid, a clear title cannot be made.

Now, the argument of the purchaser proceeds entirely on this, that this is a case in which certain moneys arising from the sale of a trust fund have been invested on the security of these premises. But it appears to me that that argument is without foundation ; and that not only the petition to the Commissioner, but the statements of the special case, displace that argument. (The VICE-CHANCELLOR referred to the passages in the special case (*ante*, pp. 773-4).)

[*564] The former part of that statement would leave it in doubt whether the mortgage was intended as a security for the *cestuis que trust*, or for Mrs. Hull personally. *(The VICE-CHANCELLOR then referred

to the memorandum (p. 774.) Now, in terms this is a deposit to secure the payment of 50*l.* a-year to Mrs. Hull. However, it was agreed between the parties that it was intended as a security to her for the replacing of the principal fund. And then follows this statement: "The said deeds were deposited," &c. (The VICE-CHANCELLOR referred to the passage (p. 774).) The parties therefore agreed that it was a deposit to secure and indemnify Mrs. Hull. The meaning of it is plainly this: Mrs. Hull has concurred in the breach of trust; both she and Mr. Knight were, and each of them was liable; as between them, Knight admits that he ought to replace the fund, and to indemnify her, and he gives her this deposit for indemnifying her.

That is also the statement in the petition for sale, which, according to the sixth condition of sale, is to be taken to be true.

The 1,000*l.* stock never was replaced. (The VICE-CHANCELLOR then referred to the order made on the petition in bankruptcy (p. 775).)

None of the *cestuis que trust* except Mrs. Hull were, it seems, served with the petition. The premises were put up for sale, under several conditions of sale, among which was the sixth (*ante*, p. 772). The purchaser attended, and was declared purchaser for 710*l.*

Now, the first point is this: Was this transaction an investment of the trust-moneys on the security of the property in question? I think it was not. It was not an investment of the trust-money at all. The security *was not given to secure the trust-money, but as an indemnity by one trustee to another trustee joining in committing a breach of trust, against any loss which might be incurred by the trustee so concurring in the breach of trust. On that ground, I should be of opinion that there is no foundation for the objection made by the purchaser; and I think that the purchaser, paying his money to Mrs. Hull, (still more if the purchase-money be, as it is proposed, invested in the names of the two trustees,) and taking his conveyance from the assignees of Knight and from Mrs. Hull, could not be touched in any manner hereafter by the *cestuis que trust* of the original trust fund.

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But the case goes further. The sixth condition, it is contended, is so framed as to mislead the purchaser—to keep out of sight, although professing to describe, the facts; and if that were so, this Court would certainly not enforce such a condition. I agree also in the proposition, that if enforcing the performance of this contract would cause a breach of trust, this Court would not enforce it.

GROOM
 &
 BOOTH.

But, firstly, as to the condition of sale, although it might certainly on the face of it, at the expense of great and unnecessary length, have set out the statements of the petition, yet as it provides that all the facts stated in the petition shall be taken to be true, how can it be said that there is any concealment? The purchaser is required by it to take such title as Mrs. Hull and the assignees can give. He is told that all the statements in the petition are to be taken to be true. This was an invitation to the purchaser to say, "If [I] am to be bound by those facts, let me see the petition."

[*566] There is in *this case indeed no allegation, and nothing to show that the purchaser did not actually see the petition; but, however that may be, he had distinct notice of it, and might have called for it before he entered into the contract. I am of opinion that the sixth condition contains no suggestion from which any inference of concealment or fraud can be collected.

Will, then, enforcing the purchase under this sixth condition be, or lead to a breach of trust? It is said that it will, because that condition of sale involved the application of the produce of the sale in paying the costs of the petition in bankruptcy, and that, it is said, will be a misapplication of the money.

Now I do not see how that would be a misappropriation of the money, even if the transaction had been an investment of the trust-money on the security of the mortgage; for if it was the necessary and legal course of proceeding to apply to the Court of Bankruptcy to realise the estate, it would not be a breach of trust for that Court to order the costs to be paid out of the fund. But it was simply an indemnity, and it was therefore right and just that the costs of the petition should be paid out of the trust fund, and it will be no breach of trust to make that application of a portion of it.

I may also observe, that the sixth condition of sale, so far from being objectionable, was a perfectly reasonable one under the circumstances set out in this case; for the case states facts, according to which it cannot without great difficulty be ascertained who are the cestuis que trust of the fund; it was therefore a very reasonable provision to make, that Mrs. Hull should receive the purchase-money *and give a receipt, not requiring the concurrence of any other person. The very terms of the condition invited the attention of the purchaser to the facts, and it is not for him now to complain that there was any deception.

There remains the question whether the Commissioner had jurisdiction. The argument is, that admitting he had jurisdiction

[*567]

if all the cestuis que trust joined, he had none in their absence. Now I am of opinion that he had a right to make the order without the cestuis que trust being before him. He had the petition that stated the circumstances of the case; showing what were the transactions in respect of which the security was given to Mrs. Hull; showing the breach of trust by Knight and Mrs. Hull; and showing that there were cestuis que trust, who were not before him. I think the principle of *Franco v. Franco* was a distinct authority for his proceeding; for if this Court would, in *Franco v. Franco*, dispense with the presence of the cestuis que trust and overrule the demurrer, the Commissioner in Bankruptcy, who clearly had the jurisdiction of ordering a sale, might make the order without the presence of cestuis que trust.

I am of opinion therefore, firstly—that the Commissioner had jurisdiction, and made a proper order in directing the sale, and in directing the costs to be paid out of the trust fund; secondly—that it was competent and proper for Mrs. Hull and the assignees to insert the sixth condition of sale; thirdly—that that condition is free from the objection made to it; and fourthly—that a good title can be made by Mrs. Hull and the assignees of the bankrupt conveying without the cestuis *que trust joining in the conveyance or in giving a receipt.

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v.
BOOTH.

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The specific questions in the special case were directed to be answered accordingly.

The first, affirmatively.

The second, affirmatively as to the first alternative, which rendered it unnecessary to answer the second alternative.

The third, affirmatively.

DAY v. DAY.

(1 Drewry, 569—575.)

[A better report of this case is given in 22 L. J. Ch. 878, for which see *post*, p. 833.]

1853.
June 2, 3.

LORD v. WIGHTWICK.

(1 Drewry, 576—586.)

[The decision in this case was varied on appeal, as reported in 4 D. M. & G. 803—815. The decision of the Court of Appeal was finally affirmed by the House of Lords, as reported in 6 H. L. C. 217—238, under the title of *Wightwick v. Lord*.]

1853.
April 2.
May 7.

1853.
April 27.
May 2.

LANE *v.* HORLOCK.

(1 Drewry, 587—617.)

[Obsolete law of usury.]

1853.
June 27.

JACKSON *v.* TURNLEY.

(1 Drewry, 617—628.)

The object of 15 & 16 Vict. c. 86, s. 50, was only to remove objection where a plaintiff, who might have consequential relief, prayed merely a declaration of his right. It did not mean to entitle a person to have a declaration as to a claim which might be made by another, under circumstances which might or might not arise.

[Under the new rules, by Ord. XXV. r. 5, additional words have been introduced to enable the Court to make declarations of right, whether any consequential relief is or could be claimed or not.

But the rule relates to procedure only, and does not give the Court power to deal with a matter which is outside its jurisdiction.

See *Burraclough v. Brown* [1897] A. C. at p. 624.]

1853.
July 6.
KINDERSLEY,
V.-C.
[629]

D'ALMAINE *v.* MOSELEY (1).

(1 Drewry, 629—635; S. C. 22 L. J. Ch. 971; 17 Jur. 872; 1 W. R. 475; 21 L. T. O. S. 297.)

A gift of all the residue of my estate and effects to A., B., and C., upon trust to collect, get in, and recover the same, and invest in stock, and pay the dividends, &c., to persons beneficially entitled; A. and B. being also executors: Held, to pass real estate.

THE question in this cause arose upon the residuary clause of the will of a Mr. Hewson, which was in the following terms: "And as to all the rest and residue of my estate and effects, I give and bequeath the same to W. Moseley, S. Edwards, W. Parkins, and M. S. Parnter, in trust to collect, get in, and receive the same, and to invest the same and every part thereof in their names in the 3l. per cent. Consolidated Bank Annuities, or other Government stocks or funds, with power to alter, vary, and transpose the same at their discretion, and to pay the interest and dividends thereof to Mrs. D'Almaine for her life, for her separate use and benefit, independent of her present or any future husband, but without power to anticipate, &c., and from and after her decease to pay and divide the said residuary estate equally among such of the eight children of the said Mrs. D'Almaine as, being a son or sons, have attained or shall attain the age of twenty-one years, or, being a daughter or daughters, have attained or shall attain that age or marry."

(1) Many later cases upon this point are cited and judicially referred to in *Kirby-Smith v. Parnell* [1903] 1 Ch. 483, 72 L. J. Ch. 468, where this case was followed.—O. A. S.

The plaintiffs were Mrs. D'Almaine and some of her children, who claimed the testator's real estate under the residuary clause. The testator died without leaving any heir.

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v.
MOSELEY.

Mr. Chandless and Mr. F. Wood, for the plaintiffs, [cited *Michell v. Michell* (1), *Barnes v. Patch* (2), *Mower v. Orr* (3), *Doe d. Evans v. Walker* (4), and other cases].

Mr. Cole, for two of the defendants in the same interest as the plaintiffs, cited *Doe d. Evans v. Evans* (5) :

[630]

If the words used are inapplicable to real estate, they are just as inapplicable to leasehold, which it is not contended does not pass.

Mr. Wickens, for the Crown :

* * All the words used are strictly and exclusively applicable to personal estate. I rest in this case principally on the inapplicability to real estate, of the limitations following the words of gift. (He cited *Doe v. Buckner* (6), *Doe v. Hurrell* (7).) * * *

[631]

Mr. Bacon and Mr. Shapter, for the trustees and executors, took no part in the argument.

THE VICE-CHANCELLOR, without calling for a reply :

The question here is between persons claiming under the residuary gift, and the Crown representing the interest, which, if there were an heir, would go to the heir.

As to the effect of the residuary clause, the question *is, whether the language shows that the testator intended to pass his real estate, or only his personal estate.

[*632]

It is entirely a question of intention. The general principles applicable to cases of this sort are well established : the difficulty is not in ascertaining the principles, but in their application ; one rule is, that the word "estate" simply, is sufficient to pass real estate ; but in most cases the word "estate" is not used simply ; and another rule is, that, supposing that there is nothing in other parts of the will to control the meaning of the gift, the effect of the word "estate," coupled with other words, is this : if the other words would without the word "estate" not be sufficient to pass the whole

(1) 21 R. R. 280 (5 Madd. 69).

(2) 7 R. R. 127 (8 Ves. 604).

(3) 82 R. R. 191 (7 Hare, 475).

(4) 81 R. R. 493 (15 Q. B. 28).

(5) 48 R. R. 657 (9 Ad. & El. 719 ;

see also *Davenport v. Collman*, 56 R. R. 112 (12 Sim. 588).

(6) 3 R. R. 278 (6 T. R. 610).

(7) 24 R. R. 265 (5 B. & Ald. 18).

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MOSELEY.

personal estate, the word "estate" will be considered as used to effect a complete passing of the personal estate; but if the other words are sufficient to pass all the personal estate, then the word "estate" must be read as intended to apply to real estate.

It is equally clear that, consistently with the general principles, there may be words in the will which show that the language used may have an interpretation different from their ordinary and proper interpretation; but the rule being that the word "estate" is sufficient to pass real estate, and the other words used in this case being effects, which is sufficient to pass all the personal estate, so far as the language is considered, *primâ facie* the word "estate" here would comprise the real estate; and unless there is something in the will to show a clear indication of intention to use the word "estate" in a sense different from its ordinary legal sense, it must be read in that sense. The cases on this subject are very numerous, and not very easy to be reconciled; but the tendency of modern decision is to give less effect to minute and trivial matters than was attributed to them in former times.

[*633]

Now in this case, it is said on the part of the Crown, that in the former part of the will there is no gift of any real estate; but it appears to me that to lay stress on that would be to rely on grounds too minute; and that no indication of intention is afforded by it.

The next point made is, that in the language used for giving the residuary property, the word "devise" does not occur. I think that also is no indication of intention: the word "give," is quite as efficient as the word "devise," to pass real estate, and is of quite as frequent use. Next, it is said that there are no words of limitation to the heirs; but neither are there to the executors; so that no particular intention can be gathered. It can no more be said that it was intended by omitting a limitation to heirs to exclude real estate, than that by the omission of a gift to executors it was intended to exclude personal estate.

Another argument is, that the individuals to whom the residuary gift is made, are also the executors. I do not think any intention can be collected from this.

Then comes the material point on which properly the counsel for the Crown principally relied. (The VICE-CHANCELLOR referred to the trusts to collect, get in, &c.) Now there is no doubt these words are strictly applicable to outstanding or other personal estate; but in strictness also they are not applicable to certain portions of personal estate, which beyond all question would pass.

If the testator had had leaseholds for years, or *even for lives, they would be personal estate; and can I say that the use of words not properly applicable to real estate, is an indication of an intention that real estate should not pass, when the very same words are applied to personal estate of a certain character, which clearly was intended to pass?

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[*634]

It is said that the leasehold estate would vest in the executors by force of law. But this is a trust to be carried into effect, by the executors, it is true, but not in their character of executors as such, but by them as trustees. They happen to be the same persons, but that does not alter their character. No doubt it would be the duty of the executors, if it were necessary for the purposes of the estate, to convert the leaseholds; but so far as it would not be actually necessary for them to sell for such purposes, they ought not to sell. If the testator also made them trustees to hold the residuary estate on trust, and those trusts require a sale, they must sell, but not in their character of executors, but of trustees.

But here there is more; it is not left to the executors to carry out the trusts; the bequest is of the residue after, if I may use the expression, the executors, as such, have done their worst; that is, when they have sold all that it might be necessary to sell for the purposes of administration—what remains after that, is the subject of the residuary bequest to the trustees, which it is imperative on them to collect, get in, &c., and those words would include and apply as well to any leasehold remaining unsold by the executors, as to any other property.

Now it would be too hypocritical to consider whether *the words “get in and receive” might not be strained to apply to real estate. Those words, properly, strictly, honestly construed, certainly apply to personal estate, and not to land: they are not properly applicable either to real estate or to leasehold estate; but still the use of them does not appear to me to indicate an intention in the testator to exclude from his bequest real estate, where they are clearly not intended to exclude personal estate consisting of leaseholds.

[*635]

I think I have now dealt with all the objections made to the validity of this residuary bequest as passing real estate. And I do not think that, on any or all of them, I can conclude that in the will there is anything so inconsistent with the intention to devise real estate, as to give to the word “estate” a meaning different from its ordinary and legal meaning. I am of opinion, therefore, that the testator's real estate did pass by the residuary gift.

1853.
July 1.

IN RE STEWARD'S ESTATE.

(1 Drewry, 636—641.)

A testator devised real estate, subject to a lease for a term of years at 25*l.* 10*s.* rent, to A. for life, remainder to B. A Railway Company purchased the interest of A. and B., subject to the lease, for 1,700*l.*, which was invested. The lease was granted at the rent of 25*l.* 10*s.* (less than a rack-rent) in consideration of a covenant to expend money, 600*l.*, on the estate during twenty years: Held, that the tenant for life was entitled to the whole of the dividends of the purchase-money.

[See now a contrary decision by the same Judge in *In re Wootton's Estate* (1866) L. R. 1 Eq. 589, which was followed by ROMILLY, M. R., in *In re United Service Co.* (1868) L. R. 7 Eq. 76, and by HALL, V.-C., in *In re Wilke's Estate* (1880) 16 Ch. D. 597.

A previous decision by KNIGHT BRUCE, V.-C., *Ex parte The Dean of Gloucester* (1850) 87 B. R. 513 (19 L. J. Ch. 400), was also in accordance with these cases.]

1853.
July 7.

CLARK v. TAYLOR (1).

(1 Drewry, 642—645; S. C. 1 W. R. 476; 21 L. T. O. S. 287.)

KINDERSLEY,
V.-C.
[642]

A gift was made by will to a particular charitable institution which had ceased before the testator's death: Held, that the gift was not to be disposed of as a charitable gift *cy près*, but that it failed, and fell into the residue.

THIS cause was heard on a motion for a decree. The only material question arose upon the will of James Baylis, the testator in the cause, which contained the following gift: "And I give to the treasurer for the time being of the Female Orphan School in Greenwich aforesaid, patronized by Mrs. Enderby, the sum of 50*l.* for the benefit of that charity." It appeared by the evidence, that Mrs. Enderby named in the will was a lady of fortune, who had been in the habit for many years previous to and after the year 1839, of spending her own money in the education and maintenance of several female children, sometimes in one house, sometimes in another, in Greenwich, which she rented at her own expense, sometimes at her own house. Mrs. Enderby for a portion of the period had a board put up in front of the house in which she carried on

(1) *In re Ovey* (1885) 29 Ch. D. 560, 54 L. J. Ch. 752, 52 L. T. 849; *In re Rymer* [1895] 1 Ch. 19, 64 L. J. Ch. 86, 71 L. T. 590. But where the institution is in existence at the death of the testator but subsequently fails, the gift may be applied *cy près*. *In re Slevin* [1891] 2 Ch. 236, 60 L. J. Ch. 439, 64 L. T. 311, C. A. And where the institution is entirely dependent upon the

testator and so determines at his death, a scheme may be devised: *In re Mann* [1903] 1 Ch. 232, 72 L. J. Ch. 150, 87 L. T. 734. And so where the will itself shows a general charitable intention applicable to the particular gift which has failed: *In re Davis* [1902] 1 Ch. 876, 71 L. J. Ch. 459, 86 L. T. 292.—O. A. S.

the education of the female children, with the words "Orphan Girls' School," or "Female Orphan School," or some such words, painted on it. There never was any trust, or deed of endowment, or any treasurer; the school being simply a school voluntarily kept up by Mrs. Enderby at her own expense.

CLARK
TAYLOR.

Mrs. Enderby discontinued the school in November, 1846; the children then being educated were sent away, and no such school afterwards continued. The testator's will was dated March, 1839; he died in October, 1840.

The question was, whether the bequest to this school *failed, and fell into the residue, or whether it was dedicated to charity, and was to be disposed of *cy près*.

[*643]

Mr. Bazalgette, for the plaintiff, cited *Cherry v. Mott* (1).

Mr. J. H. Palmer, for a defendant in the same interest.

Mr. Busk, for the executors.

Mr. Wickens, for the Crown, cited *Loscombe v. Wintringham* (2), and contended that wherever there is a charitable gift which fails, the gift being impressed with charity must be disposed of either by this Court, or by the Crown; and this was clearly a charitable gift.

Mr. Palmer, in reply :

The principle is, can you collect an intention to give for charitable purposes generally; the rule is not that wherever there is a charitable gift which fails, it goes to the Crown as charity? *Loscombe v. Wintringham* was a case of a public charitable purpose. This is not a general charitable purpose, but a gift to a supposed private charity.

THE VICE-CHANCELLOR (after stating the facts) :

I must take it upon the evidence, that, during the latter part of the existence of this school at any rate, it was entirely Mrs. Enderby's private school. She may have had from time to time, from friends or otherwise, some trifling contributions in aid, but it appears to have been substantially maintained at her expense.

The question is, whether the gift in this will is to be considered as a gift intended for charitable purposes generally, or whether it was simply intended for the benefit of a particular private charity.

[644]

(1) 43 R. R. 156 (1 My. & Cr. 123).

(2) 88 R. R. 432 (13 Beav. 87).

CLARK
v.
TAYLOR.

Now, there is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shows an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally: that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity. In many cases, it is difficult to see to which particular class the case is to be referred, and this is, to a certain extent, one of such cases.

The testator seems to have assumed that this school was conducted as charity schools usually are, by means of the usual machinery, with a treasurer or some other officer appointed, into whose hands he wished the money that he left, to be paid.

Did he intend the money to be paid to provide for the education of female children generally, or did he intend merely to provide for the education, exclusively, of such as were under the care of Mrs. Enderby? did he intend the 50*l.* to go to that particular institution? (His Honour referred to the words of the gift.) Now, these words do not appear to contemplate a charitable purpose generally, nor even generally the particular species of charity designated. A particular school appears to have *been intended. If no such school had existed, the testator could not have had the intention to benefit the particular school, and might have intended general charity; but here, upon the facts, the testator may have personally seen, and known, and approved this school. That could not have been the case in *Loscombe v. Wintringham*; there it was shown that no such institution as that referred to by the testator existed: he must have intended therefore some general purpose of charity. That distinguishes this case from *Loscombe v. Wintringham*, the authority of which I do not here in the slightest degree mean to impugn.

[*645]

Now, there having been such a school as the testator describes, it being a mere private school maintained by the beneficence of Mrs. Enderby, I cannot say that the legacy given to it is to go to any other institution. The gift, therefore, has failed, and falls into the residue.

GREEN v. MARSDEN (1).

(1 Drewry, 646—653; S. C. 22 L. J. Ch. 1092; 1 W. R. 511.)

1853.
July 25.KINDERESLEY,
V.-C.
[646]

A testator by his will gave certain shares of freehold and leasehold houses to his wife, for her sole use and benefit, begging and requesting, that at her death she would give and bequeath the same in such shares as she should think proper, and unto such members of her own family as she should think most deserving of the same. He gave her all his monies in the funds, and all the money he might be entitled to, for her sole use and benefit, begging and requesting, that at her death she would give and bequeath what should be remaining, in such sums as she should think proper, unto such members of her own and his family that she should think most deserving, and were entitled to the same. He made a codicil by which he gave in terms, his residuary estate to his wife:

Held, that both as to the freehold and leasehold property and the monies, there was no trust; but that the wife took absolutely.

THE question in this case turned on the will of Boyle Arthur. By his will the testator gave to his wife "the five shares of the freehold and leasehold messuages or tenements in the city of Bath which belonged to him, and formed part of the property of his wife's father, deceased, to and for her sole use and benefit." The will proceeded thus: "And I beg and request that at her death she will give and bequeath the same in such shares as she shall think proper unto such members of her own family as she shall think most deserving of the same. I give and bequeath unto my beloved wife all my money in the funds, and all other money that I may be entitled to, and for her sole and separate use and benefit; and I beg and request, that at her death she will give and bequeath what shall be remaining, in such sums as she shall think proper, unto such members of her own and my family that she shall think most deserving and entitled to the same, and I hereby appoint my beloved wife sole executrix."

The testator made a codicil, by which he bequeathed in terms his residue to his wife; he died in August, 1844, leaving his wife surviving: he left no issue. His widow *died in 1851, having by her will given the five shares in the houses at Bath and her residuary estate to Dr. Marsden.

[*647]

Mr. Pigott, for the plaintiffs, the executors of *Mrs. Arthur*, submitted the case for the decision of the Court.

[*Mr. Daniell* and *Mr. Bichner*, for Dr. Marsden

(1) A great number of later cases upon this subject are cited and judicially referred to in *In re Oldfield* [1901] 1 Ch. 549, 73 L. J. Ch. 433, 90 L. T. 392, C. A.—O. A. S.

GREEN
*
MARSDEN.

Mr. Bacon and Mr. T. Stevens, for some of the relations of the testatrix.

Mr. Rogers, for others of the relations of the testatrix.

Mr. Follett and Mr. Elderton for other persons in the same interest.

[648] *Mr. Bates*, for the heir-at-law of *Mrs. Arthur*, and *Mr. Elmsley* and *Mr. Money*, for other relatives of *Mrs. Arthur*,] cited *Knight v. Knight* (1), *Barnes v. Patch* (2), *Woodcock v. Renneck* (3), *Constable v. Bull* (4), *Surman v. Surman* (5), *Gibbs v. Tate* (6), *Parsons v. Baker* (7), [and other cases].

[649] *Mr. J. V. Prior*, for the heir-at-law of the testator, who was also his next of kin. * * *

THE VICE-CHANCELLOR :

[*650] I am of opinion that by this will no trust is created at all, either as to the freehold and leasehold property, or as to the money. A great number of cases have been cited, which at first sight appear to bear upon the case ; and if I thought that the decision I am about to pronounce conflicted with those cases, I should have taken time to consider them. But it appears to me, that if I were to decide that here there is a trust, I should be going much beyond the decided cases. As to the general principle there is no doubt, though on the policy of establishing such a principle I have great doubt. (His Honour referred *to a passage quoted in *Knight v. Knight* (1), from a decision of *RICHARDS, C. B.*, to show that the cases have gone quite far enough.) To every word of this I entirely subscribe, and, regretting that the principle was ever established, I shall certainly not extend it one step further than it has already gone. Now, in *Knight v. Knight*, Lord LANGDALE observed on the principle to be deduced from the cases. (His Honour referred to the judgment.) To that exposition of the principle I subscribe, but I will not go beyond it. Applying that principle to this case, there are here distinct gifts to the widow of distinct parts of the testator's property, each accompanied by words in

(1) 52 R. R. 74 (3 Beav. 148).

(2) 7 R. R. 127 (8 Ves. 604).

(3) 55 R. R. 43 (4 Beav. 191).

(4) 84 R. R. 362 (3 De G. & Sm. 411).

(5) 21 R. R. 286 (5 Madd. 123).

(6) 42 R. R. 136 (8 Sim. 132).

(7) 11 E. R. 237 (18 Ves. 476).

GREEN
v.
MARDEN.

terms precatory ; in each the precatory words are the same. Now, although the Court might hold words to create a trust as to a portion of a will, without of necessity holding that the same words would create a trust as to another portion, yet the intention as to one portion may be considered and collected by reference to the apparent intention in another. The second clause of this will is the one least open to doubt, and I shall for that reason consider it first. Now the words used, though they do not clearly amount to, might constitute a residuary bequest. The testator may have supposed that they would pass all his personal property ; and I am not sure that, if there were no other words, they would not be sufficient. But the testator, either because he may have himself considered it doubtful whether the words were sufficient to pass his residue, or because he did not intend it to pass, has by his codicil, made only a few days after his will, expressly made a general residuary bequest. The testator therefore has, by the effect of his will and codicil taken together, shown that he did not mean the gift of monies to be a residuary *gift ; but he meant by it a specific bequest of a specific portion, and he gives that to his wife for her sole and separate use and benefit. He gives it for her sole use : that does not mean her separate use in the technical sense, but it means that she should have the absolute control and enjoyment ; that the property shall be for the benefit of her, and of no other person than her. Now it is to be observed, that the testator in his residuary bequest gives his estate generally to his wife without precatory words, while in the bequest of the specific portion he uses the words referring to what shall be remaining at his death. What does that mean ? What he means is this : the widow is to have it for her sole use and benefit, that she may do as she pleases with it—that she may spend it, or give it away, or bequeath it ; but he expresses his wish, not imperatively, but desiring that she may know his wish, as to what she should do with what remains.

[*651]

Now, after the cases that have been decided, I could not say, that if the subject of gift were certain, and there was nothing to show that the language was merely precatory, there would not be enough to create a trust ; but in order to see whether that is so or not, the words used may be considered with reference to other expressions in the will ; and it is therefore proper to advert to the terms in which the objects of gift are expressed.

Now, it is said that the word “ family ” is a word that has

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[*652]

received a certain interpretation, and so it has, but still it is in itself a word of most loose and flexible description ; it may mean the heir-at-law, though that is not its natural meaning ; it may mean the next of kin, and either living at the death of the testator, or living at the death of some other person : but here the testator *does not use simply the term “ family,” but speaks of such members of her own and his family as his wife may think fit.

Looking at the whole context, I think the case comes within the language of Lord LANGDALE’s judgment in *Knight v. Knight* : “ If the giver accompanies his expression of wish or request by other words, from which it is to be collected that he did not intend the wish to be imperative ; or if it appears from the context that the first taker was to have a discretionary power to withdraw any part of the subject from the object of the wish or request ; or if the objects are not such as may be ascertained with sufficient certainty, it has been held that no trust is created ” (1) ; and that in the second clause, the testator had no idea or intention of creating a trust, but intended his wife to have the property for her own use absolutely.

In the first clause there is more difficulty in the language. It is stated that the testator was himself owner of four tenth shares of the freehold premises in Bath, and of four tenth shares of the leasehold houses in Bath, which he had purchased from the father of his wife ; one tenth belonged to his wife. As to the whole he uses this language, “ I give,” &c. (His Honour referred to the first clause of the will.)

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Treating all the five shares as his, he gives them to his wife for her sole use ; she alone is the object of his bounty ; she is alone to have the enjoyment ; and then come the precatory words, “ I beg and request,” &c., the same words as in the other precatory clause, with this distinction only, that the words “ which shall be remaining,” *which render the other subject of gift uncertain, are not in this clause ; here the subject is certain ; but when I find that in all other respects the two clauses are the same, it justifies the conclusion, that the clause falls within the same category as the other, and is within the definition expressed by Lord LANGDALE of the cases in which a trust is not created.

The only remaining question is, whether the gift to the widow of the five shares is a gift for more than her life. It is said that it is only

(1) 52 R. R. at p. 85 (1 Beav. 173).

a gift for life. Now here the testator gives the five shares, &c., "which belonged to me." To what antecedent do these words refer? Not to the words "freehold and leasehold tenements" in the city of Bath; they did not belong to the testator. What he had was not the houses, but five shares in them. The words "which belonged to me" refer therefore to the shares, not to the houses. Then "the shares which belonged to me" are the same as "my shares;" and it has been determined that the latter words pass a fee. The word "shares" means all the estate and interest of the testator.

Besides, the very terms of the precatory clause import that the widow is to devise, which she could not do if she had not a fee in the whole. I think there was a devise of the fee to the widow; that there is no trust created; and, consequently, that the will of Mrs. Arthur took effect.

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EVANS v. EVANS.

(1 Drewry, 654—683.)

[Reversed on appeal, as reported in 6 D. M. & G. 654. See *ante*, p. 732.]

1853.
May 26, 28.
Aug. 3.

CLEMENTS v. BOWES.

(1 Drewry, 684—696.)

1853.
June 22, 23.

A bill by one member of a Company on behalf of himself and all others, except the defendants, prayed an account of the receipts and payments of the defendants on behalf of the Company, and the payment of what should be found due to the plaintiff. It appeared that there were circumstances which made the interest of some of the persons purporting to be represented by the plaintiff, different from his:

Held, that this case was within the 49th section of the 15 & 16 Vict. c. 86; and the Court could treat the absent plaintiffs as defendants, and determine whether a decree should be made; and accordingly the Court decreed an account, giving liberty to certain shareholders to attend the proceedings in Chambers.

[The effect of misjoinder of parties is now of diminished importance since the Court has extended powers of amending the record under Ord. XVI. r. 11.]

1852.
Nor. 24.

Rolls Court.

ROMILLY,
M.R.

[69]

IN RE HARRISON'S TRUSTS.

(22 L. J. Ch. 69; S. C. 20 L. T. O. S. 123; 1 W. R. 58.)

A trustee going out of the jurisdiction is not thereby incapable, unwilling, or unable to act within the terms of the power to appoint new trustees, and an application to the Court is proper. But if a breach of trust has been committed, this Court, though it sanctions the appointment of a new trustee, will make no order as to the trust property.

THIS petition was presented by Thomas Bownass and Richard Batty, praying that twenty Leeds and Bradford Railway shares, standing in their names and in the name of Henry Harrison, might be vested in the petitioners, and transferred to them without H. Harrison joining in such transfer, and that the dividends might be paid to the petitioners. It also asked that R. Bownass might be appointed a trustee jointly with the petitioners, in the place of H. Harrison.

James Harrison, by his will, dated the 29th of April, 1846, gave all his personal estate to the petitioners and H. Harrison, whom he appointed his executors upon trust to invest the produce in any of the public stocks, funds, or securities of the United Kingdom, or any real securities in England or Wales, with liberty to vary the investment, and stand possessed thereof upon certain trusts therein mentioned. The will also provided that the surviving, continuing, or retiring trustee or trustees should appoint other persons to supply the vacancy "if the trustees thereby appointed, or any or either of them, should die in his lifetime, or should at his decease renounce or be incapable of acting in the trusts, or if any trustee should at any time thereafter die or become unwilling, or unable to act in the trust." The trustees, after the decease of the testator, invested a part of the personal estate in the purchase of twenty 50l. shares in the Leeds and Bradford Railway Company, each of which had been guaranteed 10l. per cent. on the leasing of the line to the Midland Railway Company; but that Company subsequently purchased the Leeds and Bradford Railway, and gave the shareholders an option of taking shares in the Midland Railway Company, and to take these shares in reduction of the purchase-money, and to issue new shares in the Midland Counties Railway Company, if the purchase-money for the Leeds and Bradford Railway Company was repaid to them within a reasonable time. This the petitioners desired to accept, as they considered it advantageous for the cestui que trust; but as H. Harrison had gone to Australia without saying where or leaving any address, this petition was presented to ask

the sanction of the Court. It was also asked that Richard Bownass might be appointed a trustee in the place of H. Harrison.

In re
HARRISON'S
TRUSTS.

Mr. S. Smith, in support of the petition :

The trustees were not justified in purchasing railway shares with the trust funds ; it was therefore a breach of trust ; but this Court will not refuse to enable the trustees to carry out an arrangement beneficial to the cestui que trust. The words of the power to appoint new trustees make this application necessary, as the words "unable to act" are not considered to apply to a trustee merely going out of the jurisdiction (1) ; and by the 13 & 14 Vict. c. 60, s. 35, this Court has power to vest the shares in the trustees.

THE MASTER OF THE ROLLS :

I think I may make an order for appointing new trustees ; but I shall refuse to make any order respecting the transfer of the shares, lest by so doing I should sanction what might turn out to have been a breach of trust.

MOORES v. WHITTLE.

(22 L. J. Ch. 207—208.)

1852.
July 28.

PARKER,
V.-C.
[207]

A testator, by his will, gave to his daughter A., so long as she should continue unmarried, all his copyhold estates situate at P., and also all his live and dead stock, furniture, monies, and securities for money, after payment of his just debts, funeral expenses, and the costs of proving his will ; and declared that, if A. should be married after his death, or die unmarried, the whole of the estates, with the live and dead stock, furniture and goods whatsoever, should be sold, and the proceeds arising therefrom be divided between B., C. and D. : Held, that the testator had charged his copyhold estates with the payment of his debts.

THIS was a special case under Sir George Turner's Act.

James Young made his will, dated the 9th of February, 1849, as follows : "I hereby give, devise and bequeath unto my daughter, Caroline Young, for her sole use and benefit, as long as she may continue unmarried, all my copyhold estates, lands and hereditaments in Piddletrenthide, held under the College of Winchester, Coles's, No. 14, B. No. 1, and No. 80, for lives, for all my term, estate and interest in them respectively to come at my decease, which I intend to surrender to the use of this my will ; and also all my live and dead stock, household furniture, monies and securities for money, and farming gear of every description, after payment of my just debts, funeral expenses, and the costs of proving this my

(1) See now the Trustee Act, 1893, s. 10.

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v.
WHITTLE.

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will ; and it is also my will and desire that, if, after my death, my daughter Caroline should be married, that then the whole of the estates above described, together with the live and dead stock, household furniture, farming implements and goods whatsoever, shall immediately be sold, and all the proceeds arising therefrom be equally divided, share and share alike, between my daughter, at present named Caroline Young, my daughter Jane, the wife of Robert Damon, my daughter Mary, the wife of Charles Phippen, and my daughter Ellen, the wife of Thomas *Keetch, for their several use and benefit ; or if my daughter Caroline Young should die unmarried, it is my will that then all the aforementioned property whatsoever shall be sold, and the proceeds thereof to be equally divided amongst my remaining surviving daughters above named." The testator then appointed George Moores and George Shepherd his executors.

The question in this case was, whether the testator had charged his copyhold estate with the payment of his debts.

Mr. W. D. Lewis, for the plaintiff, cited *Withers v. Kennedy* (1).

Mr. Ayrton, for the defendants.

PARKER, V.-C. said, that, although there was some ambiguity in this will, yet the rule of the Court was to construe wills so as to enlarge rather than to narrow the charge of debts. Besides, in the present case, it appeared that the testator, in the subsequent parts of the will, dealt with the whole property as one mass, and it was quite clear that he intended to throw the whole into one mass. He must, therefore, answer the question by a declaration that there was a charge of debts on the real estate.

1852.
Aug. 3.

PARKER,
V.-C.
[230]

IN RE CLARKE'S TRUSTS (2).

(22 L. J. Ch. 230.)

A. mortgaged real estate to B., and gave B. a power of sale, and the trusts of the surplus purchase-moneys were declared to be for A., his executors, administrators and assigns. A. died. After A.'s death the estate was sold under the power of sale: Held, that A.'s real, and not his personal, representatives were entitled to the surplus purchase-money.

MR. CLARKE mortgaged real estate to Mr. Sevens in fee, with a power of sale. The trusts of the purchase-money were declared to

(1) 39 R. B. 310 (2 My. & K. 607). 205, 47 L. J. Ch. 654; *In re Grunge*
(2) *Jones v. Davies* (1878) 8 Ch. D. [1907] 2 Ch. 20, 76 L. J. Ch. 220.

be (after payment of the mortgage debt, interest, and costs) for "Clarke, his executors, administrators, and assigns." Clarke died, and his widow took out administration to him. After Clarke's death the mortgagee sold the estate, and paid the surplus purchase-money into Court under the Trustee Relief Act (10 & 11 Vict. c. 96).

In re
CLARKE'S
TRUSTS.

A creditor of Mr. Clarke brought an action against Mrs. Clarke, as administratrix, and obtained judgment against her, and afterwards procured a Judge's charging order on the fund under the 1 & 2 Vict. c. 110, s. 14.

This was a petition presented by the judgment creditor seeking for the discharge of the debt out of the fund.

Mr. Prendergast, for the petition.

PARKER, V.-C., said that the money was real assets, and not personalty, to be administered by the administratrix, and declined to make any order on the petition.

LORD TORRINGTON *v.* BOWMAN.

(22 L. J. Ch. 236.)

1852.

Aug. 4.

PARKER,
V.-C.

[236]

A testator, by his will dated in 1795, gave certain pecuniary legacies, and then gave all the residue of his effects, real and personal, to A. and B., and then gave an annuity for the life of C., and then gave all his lands in the county of Kent and elsewhere, with his personal estate, to three trustees (naming them), their heirs and assigns, in trust for the purposes above mentioned: Held, that A. and B. took an equitable estate in fee in the lands in the county of Kent.

R. SEX, by his will dated the 7th of July, 1795, gave certain pecuniary legacies therein mentioned. The will then contained this clause: "All the residue of my effects, either real or personal, I give to my daughters Elizabeth and Catherine." The will then contained a gift of an annuity for the life of another daughter, and then concluded as follows: "I give all my lands in the county of Kent and elsewhere, with all my personal estate, to J. Bannister, J. Seabrook, and C. Funnell, their heirs and assigns, in trust for the purposes above mentioned, and I do constitute them executors of this my will." The testator died in 1795, leaving his three daughters named in his will surviving.

This was a special case, the question being, whether the two daughters Elizabeth and Catherine took an estate in fee in the lands in Kent.

LORD
TORRINGTON
v.
BOWMAN.

Mr. Bacon and Mr. Pownall, Mr. Malins and Mr. W. D. Lewis,
for the different parties.

[*Hick v. Dring* (1), *Haw v. Earles* (2), *Knight v. Selby* (3), *Moore v. Cleghorn* (4), and other cases, were cited.]

PARKER, V.-C., said, that he considered that the real estate passed to the two daughters named. *Hogan v. Jackson* decided that "real effects" meant real property. Here there was a devise of lands in Kent, and a bequest of personal estate to trustees for certain purposes, that is, to pay the legacies and charges mentioned in the earlier part of the testator's will. What, then, was to be done with the residue—the residue of the real as well as of the personal estate? The testator had given it to his two daughters, who, therefore, took an equitable estate in fee, subject to the legal estate in the trustees.

HALL v. NALDER.

1852,
July 28, 80.

(22 L. J. Ch. 242—243; S. C. 17 Jur. 221.)

PARKER,
V.-C.
[242]

Bequest of personalty to A. for life, and after his death to the issue of the body of A., with a gift over if A. should die without issue: Held, that at the death of A. all his issue, and not merely children, were entitled.

JAMES HALL, by his will, dated the 9th of May, 1758, made the following bequest: "I give and devise to my sons Robert Hall and Richard Hall, their executors, administrators and assigns, all my leasehold estate situate, lying and being in Brize Norton, in the county of Oxford, in trust to receive the rents and profits thereof, and pay and apply the same in such manner as they shall think proper for and towards the maintenance, education and benefit of Francis, the natural son of my son Francis Hall, begotten on the body of Ann Long, until he shall arrive at the age of twenty-one years; and then in trust to permit and suffer the said Francis, son of my said son Francis, to receive the rents and profits thereof during his natural life, and, after his decease, then in trust to permit and suffer the issue of the body of the said Francis, son of my said son Francis, lawfully begotten, if any such there shall then be, to receive the rents and profits of the said premises for the remainder of the term I have to come therein; but, in case the said son of my said son Francis shall die before he attains the said age of twenty-one years, or if he shall die afterwards without issue, then I give

(1) 15 R. R. 308 (2 M. & S. 448).

(3) 60 R. R. 469 (3 Man. & G. 92).

(2) 71 R. R. 723 (15 M. & W. 450).

(4) 76 R. R. 160 (10 Beav. 423).

and devise the same to my son James, his executors, administrators and assigns."

HALL
v.
NALDER.

The testator died in 1761.

In 1836, Francis, the tenant for life, died, leaving nine children, thirty-one grandchildren, and twelve great-grandchildren living at his death.

This was a claim filed by the grandchildren; the question being, who were entitled to the property on the death of the tenant for life.

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Mr. Shapter, Mr. Bagshaure and Mr. Pitman, for the different parties.

The following cases were cited: *Lethieullier v. Tracy* (1), *Eno v. Eno* (2).

PARKER, V.-C., said he thought that, after the life estate of Francis, all his issue, not merely children only, living at his death were entitled.

CHADWICK v. CHADWICK (3).

(22 L. J. Ch. 329—331; S. C. 16 Jur. 1060; 1 W. R. 29.)

1852.
Nov. 6.

Extent of a litigant's obligation to give discovery.

The test of the materiality of a fact alleged by the plaintiff, is the service it would be in proving his case if admitted or answered in the affirmative by the defendant.

TURNER,
V.-C.
[329]

Where the sole gist and object of a suit are to convict the defendant in a penalty, a court of equity will not grant any incidental discovery; but if such be not the object of the suit, a defendant who answers part of the bill cannot refuse to answer any other material parts on the ground that an admission of the facts interrogated might expose the defendant to a criminal prosecution.

Stainton v. Chadwick (4) modified.

Paxton v. Douglas (5) explained and qualified.

THIS case came on upon exceptions to the answer for insufficiency.

The bill was filed to set aside the proceedings of the defendant in the matter of a petition presented by him in 1847, under Sir Edward Sugden's Act, whereby the legal estate in certain real estate, the subject-matter of the suit, had been ordered to be conveyed to the defendant.

(1) 3 Atk. 784.

(2) 6 Hare, 171, where from the special context of the will the word "issue" received a limited meaning.—O. A. S.

(3) See *Hunnings v. Williamson* (1883) 10 Q. B. D. 459, 52 L. J. Q. B. 400, as to the effect of Order XXXI.

(4) 87 R. R. 202 (3 Mac. & G. 575).

(5) 12 R. R. 175 (19 Ves. 225).

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CHADWICK.

The bill charged that the statements in the petition were false; that the evidence in support was untrue, fraudulently concocted, and not legally admissible; and that the defendant knew that certain parts of the evidence did not relate to the person in respect of whom it had been then produced.

The bill prayed a declaration that the defendant was trustee for the plaintiff; for an account; and conveyance of the legal estate.

The first exception related to the particulars of the real estate claimed by the plaintiff, and the second to the particulars of the petition and evidence in support of it mentioned in the bill; the defendant refusing, and submitting that he was not bound to set forth any of the particulars as interrogated, except that the real estate was in the occupation of the tenants of the defendant, and that the legal estate therein had been conveyed to him under the order of the Court.

The plaintiff and the defendant both claimed to be the heir-at-law of the former beneficial owner.

Mr. Batten, for the exceptions.

In support of the first exception he submitted, that the defendant having partially answered the interrogatory in respect of it, was bound to answer fully; and in support of the second exception, that the plaintiff was entitled to have a discovery of all the documents in respect of the fraud alleged by the bill. [On the latter point he cited *Smith v. The Duke of Beaufort* (1), *The Attorney-General v. Thompson* (2).]

Mr. Elmsley and *Mr. Bird*, for the defendant, opposed the first exception on two grounds: first, that the plaintiff was not entitled to interrogate the defendant as to matters of relief consequential only upon making out his title: *Stainton v. Chadwick* (3); and, secondly, that the inquiry sought was immaterial to the plaintiff's title. [They cited *Bolton v. The Corporation of Liverpool* (4), and some older cases on this point (5).]

As to the second exception, they insisted upon the immateriality of the inquiry sought by the interrogatories; and also, that if the charges in the bill respecting the petition and evidence were true, the defendant might be exposed to criminal prosecution, and

(1) 58 R. R. 160, 173 (1 Ph. 209; affg. 1 Hare, 507).

(2) 85 R. R. 237 (8 Hare, 107).

(3) 87 R. R. 202 (3 Mac. & G. 575).

(4) 36 R. R. 251 (1 My. & K. 88).

(5) See now Order XXXI. r. 21.

therefore was not *bound to answer any inquiries which might tend to criminate himself. (They cited *Paxton v. Douglas* (1).)

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v.
CHADWICK.
[*330]

TURNER, V.-C., as to the first exception, said :

There is no doubt that the earlier cases cited are in favour of the view taken by the defendant; but a number of recent decisions have established that a defendant, if he answers at all, must answer fully; or if protected from answering, he must avail himself of the whole or in part, by plea. I do not think the case of *Stainton v. Chadwick* applies to the present case. The effect of the doctrine contended for by the defendant, if allowed, would be, that in many cases the plaintiff, although he succeeded in establishing his right, might find himself without a remedy: as, for instance, in the case of one of next of kin filing a bill against an administrator for an account, discovery and administration, the defendant putting in an answer denying the title and refusing to give any account. Now, if such an answer should be deemed sufficient and the administrator should die, the next of kin, although he might ultimately prove his pedigree, might be unable to ascertain the fund to which he may have established his claim. I do not think that Lord TRURO intended some of his expressions in *Stainton v. Chadwick* to be taken to their full extent, because he modified them by the passages there referred to from Lord REDESDALE'S *Treatise on Pleading*. I must, therefore, allow the first exception.

As to the second exception, it was argued for the defendant, that a full answer to the interrogatories would be immaterial to the plaintiff's case: but the test of their materiality is, whether the answer, if in the affirmative, would be of service to the plaintiff, whose first step in support of the allegation in this bill is, to prove that the proceedings stated took place, for he cannot move a step until they are proved to have taken place. An admission, therefore, that they did take place would be material, and save him expense and trouble.

Then, it is said, that if the facts were proved, all the Court would do would be to remove the legal estate out of the way of a fair trial of the legal estate. But I do not agree that this is the only decree which the Court would make. The defendant rests his argument on the ground that he is charged with fraud; and I am by no means sure that if this case was clearly made out, the Court would think it necessary to send an issue to be tried by a jury, or

(1) 87 R. R. 202 (19 Ves. 225).

CHADWICK
 CHADWICK.

that all the Court would think it necessary to do would be to restrain the defendant from availing himself of the possession of the legal estate in a trial at law. But if this were so, and the parties were sent to law after having established their rights in one way or another, they would come back to this Court for further relief, and it would then be a material circumstance, in dealing with the costs of all the proceedings, to consider how the parties had conducted themselves with regard to the production of the evidence and other matters mentioned in the bill.

Then it is said, that the bill charges the acts and dealing, which amount to perjury, or subornation of perjury, on the part of the defendant, and that the plaintiff is not entitled to any discovery which will prove a link in the chain attaching to the defendant the weight of a criminal prosecution; and the case of *Paxton v. Douglas* was cited as an authority against the plaintiff's right to make any inquiry in that behalf. The case of *Paxton v. Douglas* is explained by Sir ANTHONY HART in *Green v. Weaver* (1), where he says, "*Paxton v. Douglas* has been a good deal relied upon by the other side, and I am free to confess that that case did perplex me excessively by some of the *dicta* laid down by that great Judge (Lord ELDON), for he went there to the extent of stating, not only that a man should not make a discovery that would subject himself directly to penalty or criminal prosecution, but that every question leading incidentally to that conclusion would be likewise equally objectionable. Now, when one comes to look at that as a proposition unexplained, one cannot help seeing that the true principle of a bill in equity is, that every statement of fact in every bill ought to be incidentally leading *to the same conclusion ultimately as the prayer of the bill does lead to, for the fact is either conducive to the general result or it is unimportant and irrelevant. But I take Lord ELDON to have meant, (and which perhaps is not very fully explained in the report, and which satisfied my mind a good deal), not that every fact which may lead to the effect of subjecting a defendant to a penalty is objectionable, but where the sole gist and object of the suit is to convict a man in a penalty, where there would be no other purpose but to have relief in a court of equity on the footing of penalty, that, as a court of equity does not relieve on penalty, it will not give any incidental discovery."

{ *331 }

On looking at the allegations in the bill, I see nothing in them to entitle the defendant to claim exemption from the discovery now

(1) 27 R. R. 214; see pp. 221 *et seq.* (1 Sim. 401, 430).

sought which would not equally entitle every defendant charged with fraud to say, that he is charged with fraud, and that the discovery asked would expose him to be indicted for fraud. I must, therefore, make the usual order, and allow both the exceptions.

CHADWICK
v.
CHADWICK.

DRAKE v. WEST.

(22 L. J. Ch. 375—376.)

Damages are the proper remedy for breach of a covenant for quiet enjoyment.

1853.
Feb. 26.
WOOD, V.-C.
[375]

THIS was a motion *ex parte* for a special injunction to restrain the defendant, and others authorized or employed by him, from distraining upon or taking, or carrying away the goods of, or otherwise molesting, annoying, or interfering with the tenants of certain leasehold messuages and premises, comprised in an indenture of assignment of the 31st of May, 1852, or any or either of them.

The bill stated, amongst other things, as follows: By the above indenture the defendant and others assigned to the plaintiff, in consideration of 260*l.*, certain leasehold messuages (ten in number) for the respective residues of the several terms, for which the same were respectively held by the defendant. On the execution of the assignment, the balance of the purchase-money was duly paid, and the plaintiff entered into possession and received the rents, without interruption, until the month of December following, when the brother of the defendant filed a plaint in the Shoreditch County Court, against the plaintiff, for the recovery of one-half of the rents received by him since the assignment, but was nonsuited. On the 18th of January following, the whole of the tenants of the houses assigned to the plaintiff were distrained upon for alleged arrears of rent, under warrants signed by the defendant; some of the tenants paid the sums demanded, but others refused, and their goods were removed by the defendant's broker and his bailiff. The defendant excused himself to the plaintiff for having signed the warrants on the plea of drunkenness, and the plaintiff, on the 22nd of the same month, gave written notice to the defendant, his broker and bailiff, of the assignment, and of the due payment to him of the rents by the tenants, and that unless the money taken from the tenants should be returned, proceedings would be taken by the plaintiff; but notwithstanding the notice, the tenants were, on the 22nd of the same month, again distrained upon by the same person. One of the tenants then summoned the broker and bailiff for illegal

DEATH
[1853.]

before a police magistrate, who ordered the latter to pay a certain sum to return the goods of the summoning tenant, and pay the costs of the application, which, however, they had not done when the bill was filed. On the 10th of February following, the tenants were again distrained upon for rent alleged to be then due to the defendant under warrants signed by him. The bill also stated that the tenants were all weekly tenants, in humble circumstances, and would quit the houses if the distresses were continued; that the plaintiff would be unable to obtain other tenants, and would be thereby deprived of all income from the premises, and sustain great and irreparable injury, and that the defendant was possessed of little or no property, and was not capable of answering in damages for the injury sustained.

[376] The bill prayed that the plaintiff might be quieted in his possession of the premises assigned, and for an injunction in the terms of the notice of motion.

Mr. Shephard for the motion.

Wood, V.-C. said it was not a case for the interference of a Court of Chancery. The relation of vendor and purchaser had ceased on the legal assignment of the premises by the defendant to the plaintiff; and the case of the plaintiff was not analogous to those in which a bill of peace had been filed after the title to the property had been established by ejectment or repeated actions at law. The defendant's proceedings might be illegal and annoying to the plaintiff, but the Lords Justices had decided in the recent case of *The Sheffield Gas Companies* (1), that the plaintiffs in that case were not entitled to ask for an injunction, although the defendants had, without any authority and to the annoyance of the inhabitants, taken up whole streets for the purpose of laying down gas pipes.

1853.
Jan. 14, 29.

KINDERLEY,
V.-C.
[391]

EX PARTE CAUTLEY (OTHERWISE RE CANTLEY).

(22 L. J. Ch. 391—392; S. C. 17 Jur. 124; 1 W. R. 138.)

A testator being mortgagee in fee of an estate, bequeathed to trustees "all his money in the funds and on securities," upon certain trusts declared by his will: Held, that the legal estate in the mortgaged property did not pass under these words.

THIS was an application under the Trustee Act, that some person might be appointed to convey in the place of an infant heir-at-law.

(1) Since reported in 3 D. M. & G. 304.

The application was originally made before the Judge in chambers; but a question having arisen in whom the legal estate was vested, the case was directed to be argued in Court.

Ex parte
CAUTLEY.

It appeared that Roger Baskett, by his will, dated in the year 1841, after giving various legacies, gave and bequeathed to his trustees, G. Mattison and J. Foster, their executors, administrators and assigns, all his household furniture, plate, china and books, and also all his money in the funds and on securities, and all other his monies, goods, chattels and personal estate whatsoever and wheresoever, upon certain trusts therein mentioned, for the benefit of his wife and children. In the year 1833, certain estates which had been previously conveyed in fee to Kingsman Baskett, by way of mortgage, for securing the repayment of 1,000*l.* and interest, were devised to the testator, Roger Baskett, and the mortgagee being now desirous of paying off the mortgage and taking a reconveyance of the estate, a question was raised whether the legal estate in the said mortgaged premises passed by the will of Roger Baskett, under the words, "all my money *in the funds and on securities," or whether it was undisposed of by the will, and passed to his infant heir-at-law.

[*392]

Mr. Haynes appeared in support of the application, and contended, that the legal estate in the mortgaged property passed under the words of the will, [and cited *Doe d. Guest v. Bennett* (1), *In re Field's Mortgage* (2), *In re King's Mortgage* (3), and some earlier cases].

Judgment reserved.

KINDERSLEY, V.-C. :

Jan. 29.

The question in this case is, whether the legal estate in the mortgaged premises passed under the will of Roger Baskett. The passage upon which the question turns is this: "I give and bequeath to G. Mattison and J. Foster, their executors, administrators and assigns, all my household furniture, plate, china and books, and also all my money in the funds and on securities, and all other my monies, goods, chattels and personal estate whatsoever and wheresoever." What I have to decide is, whether these words, "All my money in the funds and on securities" are sufficient to carry not only the money due upon the mortgage, but the legal estate in the mortgaged premises which constitute the security.

(1) 86 R. R. 539 (6 Ex. 692).

(3) 90 R. R. 184 (5 De G. & Sm.

(2) 89 R. R. 512 (9 Hare, 414).

644).

Ex parte
CAUTLEY.

All the authorities appear to me to stand upon this distinction—that if a testator having money secured on mortgage of real estate, bequeaths the money so secured, that will not pass the legal estate; but if he bequeaths the securities upon which the money is invested, that is sufficient to pass the legal estate in the mortgaged premises.

There is, however, one case, that of *Doe v. Bennett*, which appears at first sight to militate against this rule of construction. In that case, Mr. Baron PARKE, in his judgment, makes this observation: “The question is, whether the legal estate passed by the will of the testator. The language of the will is, ‘I also leave my wife Rebecca Hayes, to receive all monies upon mortgages and on notes out at interest.’ These words in my opinion pass the security, that is, the legal estate in which the money was secured; and I should be of the same opinion if there had been no case of a devise of ‘mortgages.’ It must be assumed that the testator intended his wife to receive the money and to possess all the powers necessary for the purpose of recovering it; and, therefore, she is entitled to bring ejectment for that purpose.”

Now, if the case before me had been the same as that of *Doe v. Bennett*, I should certainly have felt great difficulty in deciding contrary to those learned Judges; but if they intended to carry the doctrine to this extent, that a legatee who is to receive the money is also to take the legal estate in the mortgaged premises, then I cannot concur in the proposition. If that principle were to be carried out, it would apply to a case where the testator gives his general personal estate to his executors—the executors would then have the legal estate, although the testator only intended them to receive the money due upon the mortgage security: that could never be the intention. The case of *Doe d. Guest v. Bennett* is not, however, in all respects, similar to this. The case which was before Sir J. Parker, *In re King's Estate*, puts the matter upon its right footing. It was there held, that “securities for money” would pass the legal estate; but that “money on securities” would not do so.

In the case before me, there is no gift of the securities, but only a gift of the money on the securities; and, under these circumstances, I think that the legal estate did not pass by the will of Roger Baskett; and, therefore, that the order must be drawn up so that there may be some person appointed to convey on behalf of the infant heir.

KING v. PHILLIPS (1).

(22 L. J. Ch. 422; S. C. 16 Jur. 1080; 1 W. R. 45.)

The fact that a person nominated as a trustee under a will has survived the testator for a great many years and has since died without proving or acting in the will, will not prevent the legal estate in the trust property devised to him from vesting in him, unless he has actually renounced probate of the will or disclaimed the trusts by deed. And the devisees of the trust estates of such trustee, acting under his will, cannot, by disclaiming the trusts of the original testator's will, divest themselves of the legal estate in the trust property thereby devised by their testator.

THIS was a creditors' suit against, amongst others, the respective representatives and devisees of the trustees of the debtor's will. The debtor died in 1829, having by his will devised the residue of his real and personal estate to two trustees and the survivor, and the heirs and assigns of such survivor, upon trust, *inter alia*, to raise and pay off the plaintiff's and certain other incumbrances, and appointed them and his wife his executors and executrix. One only of the trustees, with the executrix, proved the will, and acted in the trusts. The acting trustee died in 1832, leaving the co-trustee surviving, who, as the bill stated, never proved or acted in the will. The surviving trustee subsequently died, having, by his will, made in 1846, devised all trust and mortgaged estates to trustees, two of the defendants in the suit. These defendants, by their answer, ignored the original testator's will and the statements in respect of it, except that their testator, the surviving trustee, had never proved or acted in the trusts of it; and they submitted whether, under the circumstances, any trust estate vested in the surviving and non-acting trustee, and they disclaimed all right, title, and interest in the trust property comprised in the original will.

The only question at the hearing was, whether the legal estate in the trust property was vested in the surviving and non-acting trustee at the time of his death, and had passed to the defendants, the trustees under his will.

Mr. Smythe, for the latter defendants, contended that the legal estate in the trust property had not vested in their testator, as he had never acted in the trusts, and, consequently, that his trustees and devisees, who had disclaimed those trusts, were not necessary parties to the suit.

(1) But in *In re Gordon* (1877) 6 Ch. D. 531, 46 L. J. Ch. 794, JESSEL, M. R. said that the fact that a nomi-

nated trustee had lived three years without acting as trustee was evidence that he did not intend to act.—O. A. S.

1852.
Nov. 15.
—
TURNER,
V.-C.
[422]

KING
v.
PHILLIPS.

TURNER, V.-C., said he had fully considered the subject, and he was of opinion that unless the surviving trustee of the original testator's will had done some act to disclaim the trust estate devised to him, the legal estate in the trust property must be considered to have been vested in him at the time of his decease, and to have passed by his will to his trustees. Some act of renunciation or deed of disclaimer was requisite to divest the trust estate from the defendants' testator, and none having been done or executed by him, his devisees were necessary parties to the present suit.

COWLEY v. WATTS.

1853.

March 1.

(22 L. J. Ch. 591—593; S. C. 17 Jur. 172; 1 W. R. 318, 484.)

Rolls Court.

ROMILLY,
M.R.

[591]

An offer by letter to purchase a house at a given sum, which is accepted unconditionally, will not constructively incorporate particulars and conditions of sale into the contract merely because the purchaser and his agent had attended the auction, and had the particulars &c. given to them.

C. put up a leasehold house for sale by auction, at which W. and his agent attended; the house was not sold, but W. through his agent offered to the auctioneer 3,200*l.* for the premises, which was unconditionally accepted. Upon a bill for a specific performance: Held, that the offer and acceptance formed a contract to purchase the premises; but that the attendance at the previous auction and the knowledge of the conditions of sale did not make them a part of the agreement.

THIS bill was filed, by Daniel Cowley against Thomas Watts, for the specific performance of an agreement for the purchase of a public-house, called "The Berkeley Arms," in John Street, Berkeley Square. On the 16th of March, 1851, Mr. Watts wrote to Mr. Cronin as follows: "I hereby authorize you to purchase the lease of 'The Berkeley Arms' for any sum not exceeding 3,200*l.*, and sign an agreement according to your discretion and pay a deposit for me, and as my agent." On the 23rd of March Mr. Cronin wrote to Mr. Faithful, the agent of Mr. Cowley,—"I called on your client in consequence of your letter, but his lowest price he stated to be 3,500*l.*: as that was the case I made him no offer. I am now commissioned to offer 3,200*l.* which is our very utmost price, and I shall be glad to hear from you in a day or two upon the subject. If my employer's offer is not taken, it strikes me the property will fall several hundreds more in realizing value."

On the 25th of March Mr. Cowley called upon Mr. Faithful, and upon the foregoing letter being submitted to him, he wrote across it "I agree to sell my house upon these terms." Immediately afterwards the agent wrote to Mr. Cronin,—"Mr. Cowley will take

COWLEY
WATTS.

your offer of 3,200*l.* for 'The Berkeley Arms.' Will you, therefore, be pleased to write me an appointment to meet upon the premises to-morrow to draw the agreement?" On the following day Mr. Cronin replied: "I beg to inform you that my employer has closed on another house. Mr. Cowley has, I think, been mistaken in holding out so long."

On the 24th of February previous Mr. Cowley had offered the premises for sale by auction at Garraway's Coffee House. Mr. Faithful was the auctioneer, and Mr. Watts and Mr. Cronin were both present; it was admitted that both of them saw the particulars of sale, which contained the following clause: "The vendor shall deliver to the purchaser or his solicitor an abstract of his title to the property comprised in this particular, which is held by two leases; the one granted by T. Hopkins for thirty-two years, from Lady Day, 1839, and the other is dated 16th of January, 1852, and granted by the persons claiming under the said T. Hopkins, deceased, to the vendor, and commencing Lady Day, 1869, for thirty-one years less ten days: and it is stipulated that such abstract shall commence with such leases respectively, and that the purchaser shall not require the production of or inquire into or object to the lessor's title as to the covenants in the said leases respectively contained; and all recitals contained in such leases shall be deemed conclusive evidence of the facts therein stated or recited; and the vendor shall not be called upon to produce any deed or document not in his possession, and which may be mentioned or recited in either of such leases, whether for the verification of the abstract or otherwise; and no objection shall be made or taken that the said leases are under-leases, and they *shall respectively be taken to have been well granted; and the last receipt for rent paid shall be deemed conclusive evidence of the proper performance of the lessor's covenants to the time of completion."

[*592]

The defendant refused to complete this contract, and finally this bill was filed to compel its performance.

Mr. Temple and Mr. Bilton, for the plaintiff:

The letters of the agents have made a contract binding upon the principals. The defendant purchased from the auctioneer who had previously put up the premises for sale by auction, and as the defendant was present at that auction, he could not avoid having notice of the particulars and conditions of sale, which by implication form part of the contract. He must, therefore, be held to have

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v.
WATTS.

known that the property was leasehold, he had so stated it in his authority to his agent; he must also have known that the lessor's title could not be produced, and under the circumstances, he is precluded from requiring it. [*Ogilvie v. Foljambe* (1), *Bleakeley v. Smith* (2), *Owen v. Thomas* (3), *Potter v. Sanders* (4), were cited.]

Mr. Wilcock and Mr. Rogers, for the defendant:

No specific contract was made by the letters; a treaty was going on which was to be matured by subsequent agreement; the vendor's interest in the premises was not defined; the letters had no connexion with the previous auction, and no statement was made, which could make the conditions of sale a part of the agreement, either expressly or by implication; assuming, therefore, there was a contract, the plaintiff must produce the lessor's title: [*Stratford v. Bosworth* (5), *Thomas v. Dering* (6), *Hughes v. Parker* (7).]

THE MASTER OF THE ROLLS:

The questions for my decision are, first, whether the letters amount to a contract to purchase; and second, whether the plaintiff is entitled to a general reference as to the title, or to one limited by the conditions of sale. The letters certainly constitute such a contract as this Court is in the daily habit of enforcing; the defendant says they are immature, and amount only to treaty, and that they do not state any terms, or the interest of the plaintiff. There is, however, a distinct authority to offer 3,200*l.* for the lease, and to pay a deposit, and the act of the agent is the act of the principal, if it is within his instructions. The particulars of sale are evidence that both the principal and agent were aware of the vendor's interest in the house; they were both at the sale, and had the particulars in their possession. There was an unconditional acceptance of 3,200*l.*, which the defendant offered so as to bind him in equity.

The plaintiff then says that the purchase was made subject to the conditions of sale. In *Ogilvie v. Foljambe* the purchaser had been to the auction, but did not purchase; but the auctioneer subsequently went to him and gave him another copy of the conditions of sale, and stated that if he did purchase, it must be upon that description and under those conditions. This was the same as treating upon the particulars and conditions of sale. In this case

(1) 17 R. R. 13 (3 Mer. 53).

(5) 2 V. & B. 341. See 23 R. R.

(2) 54 R. R. 342 (11 Sim. 150).

229.

(3) 41 R. R. 88 (3 My. & K. 353).

(6) 44 R. R. 158 (1 Keen, 729).

(4) 77 R. R. 1 (6 Hare, 1).

(7) 58 R. R. 685 (8 M. & W. 244).

there is nothing beyond the fact, that the purchaser was aware that the premises had been put up for sale by auction upon certain terms and conditions. If that alone was sufficient to make them a part of any subsequent contract of purchase, no property which had been put up to auction could be sold without the contract stating that no previous conditions should be incorporated in it. This contract having been made through the auctioneer who put up the property for sale, afforded a ground for the plaintiff's argument; the mere request, however, to come and draw the agreement could not mean that he was to come and sign a contract, *which was to include the conditions of sale. I consider, therefore, that there was a contract to purchase the premises, and that it was not a mere treaty; and if the title is not accepted, I must refer it to the Master to see if a good title can be shown, and the defendant must pay the costs up to the hearing, so far as they have been increased by his disputing the contract.

COWLEY
v.
WATTS.

[*593]

MELLING v. BIRD (1).

(22 L. J. Ch. 599—600; S. C. 17 Jur. 155; 1 W. R. 219.)

One of several persons entitled to a fund, which had been paid into Court by a Railway Company upon the purchase of land, petitioned that his share might be transferred to the credit of a cause instituted for the administration of the estate. The petition was served upon the other persons entitled to equal shares with the petitioner: Held, that the Court had jurisdiction under the Lands Clauses Consolidation Act to direct the Company to pay costs in respect of a transfer from one fund to another; but that, as all the persons entitled to this fund might have been joined in the same petition, the Company were not bound to pay any costs besides those of the petitioner and the trustees. The costs of the other persons served to be costs in the cause.

1853.
Feb. 25.

KINDERSLEY,
V.-C.

[599]

THIS was a petition which stated that certain real estate had been devised by a testator to trustees, on trust to sell and divide the proceeds in manner directed by his will; that a suit was instituted for the administration of the estate, and that there were ten different parties entitled to share in the proceeds when sold. A part of the estate had been taken by the London and North-Western Railway Company for the purposes of their railway, and the purchase-money, *amounting to 330*l.*, was paid into Court under the Lands Clauses Consolidation Act.

[*600]

This petition was presented by one of the persons interested in the estate, praying that one-tenth part of the fund so paid into

(1) *Haynes v. Barton* (1866) L. R. 1 Eq. 422, 35 L. J. Ch. 233.

MELLING
v.
BIRD.

Court to which he would become entitled might be transferred to the credit of the cause.

The petition had been served upon the trustees and upon the other nine persons entitled to share in the proceeds of the estate, and several of them appeared by separate counsel.

Mr. Baily, on behalf of the petitioner, asked that the costs of the application might be ordered to be paid by the Railway Company.

Mr. Follett, *Mr. Eddis* and *Mr. Fleming*, for other parties interested in the fund, asked for their costs as against the Company.

Mr. Speed opposed the application for costs on behalf of the Railway Company, [on the ground that all the persons might have been joined in one petition.

Ex parte Molyneux (1), *Hoar v. Smith* (2), *In re Isaac* (3), were cited.]

KINDERSLEY, V.-C. :

The first question is, whether the petitioner has a right to present the petition under the Lands Clauses Act. Under that Act the petition should be by the party who would have been entitled to the lands (now represented by the fund in Court). That land would have remained first in trust for sale, if it had not been taken by the Company, and the petitioner would have been entitled to one-tenth part of the income of the estate, until it was sold, and, therefore, I think the petitioner is entitled to present the petition.

The next question is, whether the Court has jurisdiction to grant the petition. Unless jurisdiction is given by the Act, the Court will not exercise it, that is, the Court has no jurisdiction unless given by the Act of Parliament, and the question, therefore, is, whether this comes within those cases mentioned in the statute. One of the cases is, where an application is made for the payment of the fund out of Court. Now, this application is for the transfer of the fund from one account to another: that is, it is a payment out of Court from one fund to pay it in to another fund. In my opinion that is clearly a payment out of Court.

The question however is, whether those parties who are interested

(1) 70 R. R. 218 (2 Coll. 273).

(3) 48 R. R. 1 (4 My. & Cr. 11).

(2) 89 R. R. 710 (14 Jur. 55).

in the fund ought to appear upon this petition, and, therefore, whether the Company ought not to pay the costs. It appeared to me upon the authorities which had been cited, and also upon the good sense of the matter, that all those parties should have the costs, who ought to be served, and who, consequently, ought to appear. But if there be a great number of persons entitled to aliquot shares, and one person receives for all, it is not a matter of course that the Company should pay the costs of all. This petitioner asks for payment of one-tenth of the fund, and there are nine other parties who are entitled each to a tenth, and all those parties may or do appear separately. Now, it appears to me, that the petitioner ought to have applied to the other parties having the same interest to join in the petition. There might certainly have been a good reason why they should not have joined, and if that had been the case, the Company would still have had to pay their costs; but it does not appear in this case that there is any reason why they should not all have been joined. No doubt there is sufficient reason why the trustees ought not to have been joined in the petition. I think, therefore, that the Company ought not to be ordered to pay any other costs than those of the petitioner and of the trustees. The costs of the other parties will be costs in the cause.

MELLING
v.
BIED.

FROST v. BEAVAN.

(22 L. J. Ch. 638; S. C. 17 Jur. 369.)

1853.
March 2.

On claim by a vendor for specific performance by a purchaser, found by inquisition to have been lunatic at the time of the contract, the COURT declared the contract to have been null and void, and ordered the residue of the deposit, after deducting the vendor's costs, charges and expenses, to be repaid to the committee of the lunatic's estate.

WOOD, V.-C.
[638]

THIS was a claim by a vendor against a purchaser for specific performance of a contract for sale. By inquisition subsequently to the date of the contract, the purchaser was found lunatic from a date preceding the contract. The claim asked for a decree for specific performance, or in the alternative, for a declaration that the contract was null and void, and asked for the costs of the suit.

Mr. Lewin, for the plaintiff, cited *Mackreth v. Marlar* (1).

Mr. Wright appeared for the defendant.

(1) 1 R. R. 31 (1 Cox, 259).

FROST
v.
BEAVAN.

WOOD, V.-C. declared that the contract was null and void, and ordered the costs, charges and expenses of the plaintiff to be taxed and deducted from the deposit made on the purchase, and the residue to be paid to the committee of the lunatic's estate.

1853.
April 18, 20.

KINDERSLEY,
V.-C.

[697]

PATTENDEN v. HOBSON (1).
PATTENDEN v. CHURCH.

(22 L. J. Ch. 697—706; S. C. 17 Jur. 406; 1 W. R. 282.)

A testator gave all the residue of his property of what kind soever and wheresoever, to his wife for life, to be invested in the public funds, in the joint names of his executors; he also left to his wife his business of a dyer, and also a lease of the house and premises in Carpenter Street for twenty-one years from the day of his death; and at the demise of his wife, the rest of his property to be equally divided among his three remaining daughters, or the "heirs of their bodies lawfully begotten, should they be taken away before the time of our demise": Held, that all the testator's property, freehold, copyhold, and leasehold, ought to have been sold upon his death, including the house in Carpenter Street, subject to the lease to the testator's widow, and that the widow's representatives were liable for any loss occasioned by the non-sale at that period; and also that the other acting executor ought to have joined in selling all the estates, but could not be rendered liable for any loss occasioned by non-sale, upon this bill, as the parties had elected to take the property in specie.

Held, also, that the words "heirs of their bodies," when applied to personalty, meant "children," who would be entitled to take in substitution for their parents.

Held, also, that the COURT having directed inquiries as to who were the "heirs of their bodies," and such heirs being interested in the question of liability of the executors for loss, it was competent for the Court to determine that question upon further directions.

THE bill stated, that William Helder, by his will, dated the 11th of February, 1823, gave to his wife, Mary Helder, a sum of 370*l.*, and also a house in Park Lane, for her own proper use and benefit, at her sole disposal, with the furniture and books that should be in his house at Lewes at the time of his decease; and all the remainder of his property of what kind soever, or wheresoever it might be, at the time of his decease, he left to the said Mary Helder, for her use, during her natural life, to be vested in the public funds in the joint names of his executors thereafter mentioned. But besides what he had in the former part of his will bequeathed to his wife, Mary Helder, he also willed and bequeathed to her his business of a dyer, carried on at his house in Carpenter Street, and also a lease of the said house and premises for the term of twenty-one years, to be

(1) *In re Jeaffreson's Trusts* (1866) L. R. 2 Eq. 276, 35 L. J. Ch. 622.

granted to her from the time of his decease. And at the demise of his said wife, Mary Helder, the rest of his property to be equally divided between his children, share and share alike, viz., his daughter Susannah Warne, and the plaintiffs, Rebekah Pattenden and Sarah Beer, his three remaining daughters, for their own proper use and benefit, without controul of their husbands, "or to their heirs of their bodies lawfully begotten, should they be taken away before the time of our demise"; and after stating that his daughter, Mrs. Hobson, was dead, and that she had left two children, he willed and bequeathed to them their late mother's share of his property, viz., he willed and bequeathed to his grandsons John and James Hobson, what would have been the mother's part had she outlived him, the said testator; his intention being that they should come in for an equal share with his three then living daughters before mentioned. He then appointed George D. Hobson, W. Marriott and Mary Helder to be executors and executrix of his will.

PATTENDEN
v.
HOBSON.

The testator made a codicil to his will, dated the 8th of January, 1824, whereby he gave a certain copyhold estate at Framfield, in Sussex, which he had lately purchased, to his wife and her assigns for life, and after her decease he directed his executors or administrators to sell and dispose of the same; and the monies to arise by the sale to be received by them in aid of the personal estate, and go in the same manner as he had directed by his will concerning his personalty. He also made two other codicils, but neither of them affected the questions now raised, and died in October, 1825, leaving his wife, his three children, and his two grand-children surviving him.

The bill then stated that George D. Hobson, W. Marriott, and Mary Helder duly proved the will and codicils, and *possessed themselves of the personal estate and effects of the testator, and that Mary Helder entered into the possession of the copyhold, freehold, and leasehold estates of the testator, or into the receipt of the rents and profits thereof. That William Marriott departed this life, after having accounted to his co-executors for all that he had received as one of the testator's executors; and the testator's daughter, Susannah Warne, died in August, 1843, a widow, leaving five children; Rebekah Pattenden had seven children, and Sarah Beer had three children.

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The bill prayed that an account might be taken of the personal estate and effects of the testator at the time of his decease not specifically bequeathed, and of such parts as had been possessed or

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HOBSON.

received by or for the use of the defendants G. D. Hobson and Mary Helder, or either of them, and that the rights of the parties, under the will and codicils, might be ascertained, and the surplus and residue invested for the benefit of the plaintiffs; and that an account might be taken of the injury and damage which the freehold, copyhold, and leasehold estates of the testator had suffered by the neglect of the defendants G. D. Hobson and Mary Helder, and that such of the estates as remained unsold might be disposed of under the direction of the Court, and that the defendants might be ordered to make good any loss which should have been sustained by reason of the freehold and leasehold premises not being sold immediately upon the decease of the testator, and that a receiver might be appointed.

Mary Helder died in January, 1849; and thereupon a bill of revivor and supplement was filed.

When the cause came on for hearing, a reference was directed to the Master to make certain inquiries as to whether all the proper parties were before the Court, and a receiver was appointed. The bill of revivor and supplement stated the death of Mary Helder, and that the defendant John Church became her legal personal representative. The Master having made his report, the cause now came on upon further directions; and the questions argued were, whether Mr. Hobson, the surviving executor of the testator, was liable to make good a loss which was alleged to have arisen by reason of the non-sale of the testator's property immediately after his decease, and whether under the words of the will "heirs of their bodies," the testator intended the persons to take who would be entitled as issue in tail, or the children of the persons named in the will.

Mr. Shapter appeared for the plaintiffs, Rebekah Pattenden and Sarah Beer, and contended that under the words of the will of W. Helder, the executors of the testator ought to have sold the whole of his estates upon his decease; that the house in Carpenter Street ought to have been sold, subject to the lease for twenty-one years, to the widow, and that the executors were liable for the loss occasioned by the non-sale.

Mr. Craig and *Mr. Fischer*, for the surviving executor Mr. Hobson, submitted, that as the widow had been in possession of the property, and in the receipt of the rents, her estate was liable in

the first instance for the loss, if any, which might have been sustained; but as to the house in Carpenter Street, it was contended, that the executors were not bound to have sold that property until the expiration of the twenty-one years' lease to the widow. [They cited *Coope v. Carter* (1), *Jones v. Morrall* (2), and other cases.]

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v.
HOBSON.

Mr. A. Smith appeared for the representative of *Mrs. Helder*, and followed the same line of argument as the counsel for *Mr. Hobson*, as to the executors not being bound to sell the house in Carpenter Street until the expiration of the twenty-one years' lease.

Mr. Vance, for the younger children of *Susannah Warne*, contended, that under the bequest to the three daughters, or the heirs of their bodies, all the children would take equally the share of their mother. The property left by the testator was directed to be sold, and therefore was to be *taken as personalty; and when personalty was given in this way, all the children were intended to take as next of kin, and not the child who would be heir as tenant in tail of a freehold estate.

[*699]

The following cases were cited, in which a construction was put upon the three different terms "heirs-at-law," "heirs," and "heirs of the body": [*Ware v. Rowland* (3), *Doody v. Higgins* (4), *Gittings v. M'Dermott* (5), *Price v. Lockley* (6), *De Beauvoir v. De Beauvoir* (7).]

Mr. Hislop Clarke, for the heir-at-law of *Susannah*, contended that it was not compulsory upon the executors to sell the property left by the testator, and that the heir-at-law was entitled to take it as freehold estate. The words must be construed strictly, and meant the heir of the body of each daughter: *Jesson v. Wright* (8).

THE VICE-CHANCELLOR:

In this case I have to determine first of all, whether *Mr. Hobson*, who is the surviving executor of the testator, is liable to make good a loss which is alleged to have arisen by reason of the non-sale of

(1) 95 R. R. 111 (2 D. M. & G. 292).

(2) 89 R. R. 275 (2 Sim. N. S. 241).

(3) 78 R. R. 228 (2 Ph. 635).

(4) 89 R. R. 697 (9 Hare, app.,

xxxii).

(5) 39 R. R. 139 (2 My. & K. 72).

(6) 63 R. R. 46 (6 Beav. 180).

(7) 88 R. R. 191 (3 H. L. C. 524).

(8) 21 R. R. 1 (2 Bligh, 1).

PATTENDEN the testator's property ; and also the question, whether under the
HOBSON. words, "or to their heirs of their bodies lawfully begotten should
they be taken away before the time of our demise," whether the
term "heirs of their bodies" is to mean, strictly speaking, the heir
of the body, the person who would take as issue in tail under a
limitation in tail, or means in this case, the children of the party.
Now, the will, although drawn with a certain degree of care, is,
in many respects, inartificially framed. There is a specific and
express direction to sell the testator's property, and after certain
specific bequests or devises, not material to the present question,
the testator gives this direction: "and all the remainder of my
property of what kind soever, or wheresoever it may be at the time
of my decease, I leave to my dear wife Mary Helder for her own
use during her natural life, to be vested in the public funds in the
joint names of my executors hereinafter mentioned." Now, it is
not disputed but that the expression "all the remainder of my
property of what kind soever, or wheresoever it may be at the time
of my decease," will include all the testator's property, real as well
as personal, and that all that property is the subject of this bequest
and devise. The testator clearly directs, in express terms, that all
the remainder of his property shall be vested in the public funds in
the joint names of his executors. Now, it is quite clear, that that
is impossible unless that portion which consists of realty can be
sold ; because it is impossible to vest real property in the public
funds in the names of executors unless you first sell that real
property and then invest the produce in the public funds. I think,
therefore, there is a clear expression of the testator's intention that
all his property should be sold, including the realty. Then, after
that direction, the testator adds this clause: "But besides what I
have in the former part of this my will bequeathed to my wife Mary
Helder," referring to certain specific bequests he had made to her,
"I also will and bequeath to her my business of a dyer carried on
at my house in Carpenter Street." That took out of the gift of the
remainder of his property whatever is implied by the expression
"my business of a dyer." Then, he adds, "and also a lease of the
said house and premises," that is—the house and premises in
Carpenter Street,—“for the term of twenty-one years to be granted
to her from the time of my decease.” Now, the Carpenter Street
property was a leasehold property, as I understand, held by the
testator on lease for a term, so that what he then directs is this :
sell all my property and invest it in the public funds, but with

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respect to a particular portion of that property, namely, the leaseholds in Carpenter Street, before you sell that, grant to my wife for twenty-one years a lease of those premises. I think I must take it that that also was meant to be a beneficial lease without any reservation of rent from her, except so far as the nominal rent of a peppercorn might be reserved to keep up the usual form of a demise. Here, there *is a direction, as I construe it, to sell all the property, freehold if there was any, copyhold if there was any, leasehold, and every other species of property for the purpose of investing it in the public funds in the names of the executors, but with a direction as to a particular part of the property that the wife was to have a beneficial lease for twenty-one years.

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One question suggests itself, viz. : did the testator by directing that this lease for twenty-one years should be granted to his wife of the Carpenter Street property, thereby postpone to the expiration of that lease the sale of the Carpenter Street property? Or am I to understand the direction to sell all his property, which I consider implied in the direction to invest it, remained untouched, and that the sale was still to take place, notwithstanding the grant of that lease to the wife for twenty-one years? Now, I see nothing whatever to lead me to the conclusion that he meant to postpone the sale of the Carpenter Street property to the expiration of the lease. If the testator himself had held the Carpenter Street property subject to a lease for a term of years vested in any other person, his direction to sell all his property would have involved the necessity of selling that reversionary interest as well as any other interest he had which constituted his property; and I do not see why his directing a beneficial lease to be granted to his wife of this particular property, in any way cuts down the effect of the original direction to invest the whole of his property in the funds, because part of his property would consist of the reversion of the lease which he directs to be made to his wife, and that is part of the remainder of the property which I consider he has directed to be sold. I think, therefore, if the testator's direction had been distinctly carried out, the executors would have done what, in fact, they did thus far, would have granted a beneficial lease for twenty-one years to the wife, or what is the same thing, which actually took place, to a trustee for the wife, and then sold the reversionary interest in the Carpenter Street property subject to that lease, and then the produce of the sale of the Carpenter Street property, that is, the reversionary interest, would have constituted part of the *corpus* of

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his estate, in which his wife was entitled to a life interest. I think that is the construction I am obliged to come to ; I can find nothing to indicate that the sale was to be postponed till after the death of the wife.

As to a particular portion of the property which he was the owner of at the time of his death, he does by the codicil specially direct that the sale of that property shall not take place till the death of his wife, but that was property which he appears not to have possessed at the time he made his will ; but in making the first codicil, about a year or thereabouts after the date of the will, he refers to the fact that he had lately purchased of a Mr. Simmonds and another person, certain copyhold estates holden of the "manor of Framfield, in the county of Sussex," and he devises that, in specific terms in specie to his wife for her life, and then after her death he directs a sale of that property. That cannot at all affect what by the will he had directed to be done in respect of the property which he was disposing of by the will. Then the testator having by the will given the direction I have referred to, goes on to direct what shall be done at the demise of his wife : "and at the demise of my dear wife Mary Helder the rest of my property," which clearly means the property which he has before directed to be vested in the public funds in the joint names of the executors, "to be equally divided amongst my children, share and share alike, namely, my daughter Susannah Warne, Rebekah Pattenden and Sarah Beer, my three remaining daughters, for their own proper use and benefit without controul of their husbands." Now, if it had stopped there, there could have been no question of what the effect was : the whole of that property thus converted into money would at the death of the wife, belong to those three daughters in equal shares, share and share alike, but then he adds, "or to their heirs of their bodies lawfully begotten, should they be taken away before the time of our demise." Now, stopping there, the first question suggested is, what is the meaning of the expression "our demise" ? I think it is clear that it does not mean the same thing as "my demise." He had just before given all the property to his wife for life : it might be that his wife would survive him, to take *that benefit, or it might be that his wife would predecease him, and he does not mean his children to take the property until the death both of himself and his wife, because his wife, if she survives, is to have a life interest. Then he says, if either of these three children of mine, three daughters, "shall be taken away before the

time of our demise," that is, the time at which both of us shall have died, then instead of going to them, it is to go "to their heirs of their bodies lawfully begotten," whoever they may be. PATTENDEN
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Now one question is, what is meant by the expression "heirs of their bodies lawfully begotten"? which I will postpone for the present, in order to consider the question how far Mr. Hobson, the trustee, is liable, from the position in which the estate stands, for any loss by reason of the non-sale. There is no doubt, according to the construction I have said I put on the will, that with regard to all the property except the particular copyhold property mentioned in the codicil, it ought to have been sold immediately, or at least within a reasonable time after the death of the testator. But it was not sold, and it has not been sold up to the present time. It appears that the testator was not, as far as I can collect, entitled to any freehold property.

(*Mr. Shapter* here stated that the testator had a small freehold house.)

It really makes no difference in the view I have taken of it, as will be seen. However, I will assume now that there was a small piece of freehold property. There was the copyhold property which the testator had bought after the date of his will, and lately before the date of the codicil, which he disposes of by the codicil, and there are two portions of leasehold property, one he specifically mentions in Carpenter Street, and some leasehold property in Baldwin Street; as to the freehold estate, if there was any, and also the leasehold property, it should have been sold immediately, or within a reasonable time after the death of the testator. Whether the executors had any power to sell the freehold property, it is not necessary to decide; but I do not quite see my way to determine, if it was only depending on the question of the non-sale of the freehold property, that the executors *quâ* executors had any power given them to sell the freehold. There might have been a bill filed of course to compel the sale, but there is no vesting of the freehold estate in the executors as trustees, nor is there any specific direction to them that they shall sell the property. But with regard to the leasehold estate, there is no doubt they had ample power to sell the property, by virtue of the direction that it should be invested in the public funds.

One question has been raised on the former argument of this case, whether now, upon further directions, the question

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as to the liability of Mr. Hobson in not selling these leaseholds is not concluded—whether I can upon further directions enter into that question, or whether it ought not to have been decided, or disposed of in some way, on the original hearing. Now I take the rule of practice to be quite clear on that subject, which is founded on good sense and reason. I conceive the rule to be this. If the bill prays certain relief against a defendant, and the Court is in a condition at the original hearing, with reference to having proper parties before it, and with reference to having sufficient evidence of the facts before it, to decide that question, the matter ought to be determined at the original hearing, unless it be by the decree specifically reserved; but if by reason of the Court not having before it all the parties necessary to determine the question, that is, interested in the determination of it, or has not sufficiently before it all the facts necessary to determine the question, then the Court at the original hearing may and will direct inquiries or accounts to be taken for the purpose of ascertaining who are the proper parties, and whether they are before the Court, and also for the purpose of determining any fact, or taking any accounts which are necessary or useful for the purpose of enabling the Court to determine the question; and if the Court does give a direction for taking any such account, or making any such inquiry, then under the common reservation of further directions without any specific reference to the precise point, the matter is open upon further directions. Now how does it stand here? Here is a case in which the parties interested in the determination of the question, whether *Mr. Hobson is liable for any loss arising from the non-sale of the testator's property, would be under the circumstances uncertain. Susannah Warne having died before the death of Mrs. Helder, it was necessary to determine who were to be substituted for her, whether her legal personal representative, or the heir of her body strictly so called, or her children. If that be the construction to be put on these words, "the heirs of their bodies," there was no *constat* before the Court that all those persons were before the Court at the original hearing, and until that was determined the Court ought not to have taken on itself to decide that question. The Court did direct an inquiry who those persons were, for by the original decree there is directed an inquiry, "whether Susannah Warne is living or dead; if dead, when she died, and who is her personal representative, and whom she left her heirs of her body her surviving, and whether she left any and what children surviving,"

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and whether they were living or dead, or out of the jurisdiction. The giving of that direction, as it appears to me, was sufficient to reserve under the general reservation of further directions any questions which any of those persons, who were thus to be inquired about, might be interested in, or who ought to be before the Court when the Court determined any such question. The Court might simply have given the direction to make the inquiry who those parties were, or it might, as it did, go further and say, if it appears that all those persons are before the Court, then take certain accounts and make certain further inquiries; and in dealing with that, directing the common accounts to be taken if the Master shall find all those persons to be inquired about were parties to the suit. It did not go on to direct if the Master should find all those persons before the Court, he should then proceed to inquire whether any and what loss has been occasioned by reason of the non-sale of such estates. I do not say it ought to have been done, but it might have been done, and the omission to do it leaves the question still open. I conceive, therefore, that the question as to the liability of Mr. Hobson is still open upon further directions for the determination of the Court.

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Then comes the question upon the pleadings—ought the Court to hold Mr. Hobson liable for any loss that may have been sustained? Now, upon the will it appears to me, as I have said, to have been the duty of Mr. Hobson and his two co-executors to have sold the leasehold estates at least. When I look at the bill, I confess I am a good deal embarrassed by the manner in which it has been framed. After setting out the various matters by way of narrative necessary to state the case, having stated the fact that a lease for twenty-one years of the Carpenter Street property had been granted to the widow in pursuance of the direction of the will, it states thus: "That Mary Helder also entered into the receipt of the rents and profits of the testator's copyhold estates held in the manor of Framfield, in the county of Sussex," that is, the copyhold property mentioned in the codicil, which she clearly was entitled to for her life in specie, "and to all his freehold estates, and she is now in the receipt of the rents and profits thereof." (Mrs. Helder was alive at the time the bill was filed, and indeed at the time the decree was made.) "That Mary Helder, with the consent of George David Hobson and William Marriott, entered into possession and receipt of the rents and profits of all the leasehold messages, tenements, land and

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premises belonging to the testator, and among others of several houses situate in Baldwin Street, City Road, and ever since has continued and now is in such possession and receipt, and has applied all the said rents to her own use." Part of that is introduced by way of amendment. Then it states other facts by way of narrative not material to be noticed at present, and then we have this charge: "That George David Hobson, William Marriott and Mary Helder have wasted the estate and the effects of the testator, and have not properly managed the estate of the testator according to the trusts reposed in them by the will, and as evidence thereof the plaintiffs charge,"—now these matters are charged by way of evidence of this wasting and mismanagement,—"that the defendant George David Hobson, William Marriott, and the defendant Mary Helder ought to have sold all the freehold *and leasehold estate of the testator immediately after his decease, or, at least, they ought, with the exception of the premises in Carpenter Street, to have sold the leasehold and freehold estate of the testator immediately after his decease, and they ought to have sold the premises in Carpenter Street immediately upon the expiration of the term of twenty-one years granted to the said Mary Helder as directed by the will." Then comes by way of amendment this specific charge, which is very material, "Charge that if the rents received from the said leaseholds exceed the amount of dividend which would have arisen from a proper investment of the proceeds of sale of the leaseholds, the said defendant Mary Helder ought to account for and pay such excess, and that she ought to set forth an account of the rents, issues, and profits received for and on account of the said leasehold estates;" so that here is a specific charge, and a very just one, that if Mary Helder, by reason of the non-sale of the leaseholds, had received more than she would have received as the dividends of the stock, if the leaseholds had been sold and the money invested, she ought to account for the excess; but, of course, if she accounted for the excess, and made that excess good, that is on the footing of the leaseholds remaining, in fact, unsold and continuing in specie after the death of Mary Helder. If the executors are to make good all the loss arising from the non-sale, Mary Helder is not in addition to make good the excess beyond what she would have received, if there had been a sale. Then there is added another charge which immediately follows, and which is extremely material also, "Charge that the copyhold premises held of the manor of Framfield, in the county of Sussex"—which, be it

observed, was not to be sold till the death of Mary Helder, according to the codicil—"and also the leasehold messuages, buildings, and premises situate in Baldwin Street, City Road, have been neglected and fallen into decay, and are now in a very ruinous and dilapidated state; and that by reason of such neglect"—that is, in letting them fall into a dilapidated state,—“and misconduct of the said defendants, the copyhold and leasehold messuages, buildings, dwelling-houses and premises are now of much less value than the same were at the time of the death of the testator, and that a very large sum of money will be required to put the same into substantial and tenantable repair; and the estate and interest of the plaintiffs in the freehold and copyhold estate is greatly depreciated in value, and the shares of the plaintiffs in the residuary personal estate will be greatly diminished.” Now, it must be observed what that charge amounts to—that by reason of the non-repair, not only of the leaseholds, but by reason of the non-repair of the copyholds also, there has been a great dilapidation, the consequence of neglect and misconduct, so that the shares of these parties are very much depreciated in value, and they apply in express terms, not to the leasehold estates only, but to the freehold and copyhold estates, as to which the receipt by the widow of the income was no mischief, because, being a permanent property and not wearing out by lapse of time, its not being sold could not prevent her having, while it remained unsold, the right to receive the whole of the income of the freehold and copyhold estates. That applies not only to the freehold, which is a property of a permanent nature, but it applies to the copyhold property, which according to the express terms of the testator's will, is not to be sold till the death of the widow. Then it charges that it will be for the benefit of the parties that a receiver should be appointed of the real and personal estate, and so on; and that the executors, Mrs. Helder and Mr. Hobson, should be restrained from interfering at all with the property.

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Then the bill prays, first, the usual accounts of the personal estate, and then prays that the residue may be ascertained and secured and invested at interest for the benefit of the plaintiffs; and “that an account may be also taken of the injury and damage which the freehold, copyhold and leasehold estates of the testator have suffered by the neglect and misconduct of the defendants, George David Hobson and Mary Helder, or either of them,” leaving out Mr. Marriott. It may be observed they do not make his

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representative a party, because they say he accounted just before his death to the other executors for *all he had received. I am not saying there is a want of parties here. The plaintiffs say, "make those two parties liable." For what? For that misconduct of theirs by reason of which the freehold and copyhold as well as the leasehold estate has been diminished. Then it prays, "that such of the testator's freehold and leasehold estates as remain unsold may be sold." It does not ask for a sale of the copyhold, because Mary Helder was living when the bill was filed; "and that all necessary parties may join in such sale." Then it also prays,—and this is the only part of the prayer substantially against Mr. Hobson, individually seeking to make him liable,—“that the defendants, George David Hobson and Mary Helder, may make good any loss which the plaintiffs and the other parties interested in the testator's estates”—it is remarkable that the word “freehold” is put in by amendment—“may be found to have sustained by reason of the freehold and leasehold premises not being sold immediately after the decease of the testator, and by reason of the investment in Government annuities” not being made; “and that when so made good the same may be secured in like manner as the surplus or residue of the testator's estates; and that in the mean time the defendants, George David Hobson and Mary Helder, may be restrained, by the injunction of this Court, from selling or disposing of and from charging or incumbering the leasehold messuages or tenements of the testator, or any parts or part thereof, and from granting any lease thereof; and that the title deeds,” and so on, “of all the freehold, copyhold and leasehold estates of the testator, William Helder, may be properly secured for the benefit of the plaintiffs or such other person as may be entitled thereto at the death of Mary Helder.” That is, it seeks in terms to preserve the title-deeds not only of the freeholds and copyholds, but of the leaseholds also, until the death of Mary Helder; and that, upon the death of Mary Helder, the person entitled may have the benefit of them.

The question I have had to consider, and I really felt considerable doubt about it, is, whether there is here on the face of these pleadings, coupled with what the parties choose to do under the decree, and coupled with what they asked for and took in the decree with regard to the non-sale of the estate, I can now say that I ought, in this stage of the cause or any stage of the cause, to charge Mr. Hobson with any liability by reason of the non-sale of the

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freehold, copyhold and leasehold estates. That Mrs. Helder is liable to make good any excess from what she has received, by reason of having received the whole income of the leaseholds in lieu of receiving only so much as would have been the value of the stock if the leasehold had been sold and the money invested in stock, I have not the slightest doubt, and I do not understand why the counsel for Mrs. Helder at all contest that liability; and that is the remedy which I think upon these pleadings and these further directions the plaintiffs are entitled to. I ought to observe, that when I refer to what was done on the former decree I refer to this, that these parties, though they might have been entitled to have had a sale of the estate, that is, the freehold and leasehold estates (not the copyhold, for Mrs. Helder was then alive), though they might have had a decree for the sale of both, they chose not to take a decree for the sale, but they determine that they will keep the property in specie, leasehold as well as freehold, and they refer it to the Master to inquire, having got a receiver, whether it will be for the benefit of the estate, for that is the form of the decree (which, of course, means for the benefit of the parties interested in the estate), that the leaseholds should be repaired, whether any and what money should be laid out in repair, and out of what fund that should come, and whether it would be for the benefit of the estate that leases should be granted, showing the election of the parties to retain the property in specie, saying, in fact, "It now having realized only so much, ascertain what it would have realized if sold at the death of the testator; but keep the property in specie; let the future proceedings in the cause proceed on that ground." I am of opinion, therefore, that I ought not to charge Mr. Hobson personally with any loss arising from the non-sale of the property, although I do not mean to say, that if the pleadings had been so framed, and the decree so taken *as to justify it, that Mr. Hobson would not have been liable in the performance of the duties of the will to have joined in selling the leasehold estates, and that he would not be liable for any loss by reason of the non-performance of that duty. There must be a direction to ascertain what would have been the value, if sold at the expiration of one year after the testator's death, of the leasehold property, and also what amount of stock would have been realized if the leasehold property, including the reversionary interest in the Carpenter Street property, subject to a lease for twenty-one years, at a pepper-corn rent, had been sold at the expiration of one year after the

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PATTENDEN testator's death ; what that would have produced if invested in 3/.
HOBSON. per Cent. stock, and what would have been the yearly dividends arising from such stock ; then take an account of what have been the rents of the leaseholds received by Mrs. Helder during her life, reserving further directions ; and I think there should be a declaration that Mrs. Helder's estate is liable to make good the excess of what she received in respect of the rents of the leaseholds, other than the Carpenter Street property, during the twenty-one years, beyond what she would have received if they had been all sold in the manner I have directed the inquiry, and the amount invested in 3/. per Cent. stock.

Then the only remaining question is that which I reserved to the end, as to the construction of the words in the will, "or to their heirs of their bodies lawfully begotten, should they be taken away before the time of our demise." Now there is no doubt about it ; indeed it is not contested but that this limitation is substitution, that is, that the shares were given to the three daughters, or by way of substitution given to the persons intended by "heirs of their bodies," in case they should not survive the demise of the testator and his wife. The testator, upon the true construction of the will, with regard to the question as to the obligation to sell the estate, has directed the estate, whether realty or personalty, all to be converted into personalty, and as personalty to be enjoyed by the widow for life as personalty, and to be divided after her death as a personal fund among the children, or "the heirs of their bodies lawfully begotten, should they be taken away before the time of our demise." And the question is, whether the words "heirs of their bodies" mean, strictly speaking, a person who, upon the limitation of real estate, would be intended by that description, or next of kin, or children.

Several cases have been referred to very strongly bearing on the present case, some relating to the construction to be put on the words "heir-at-law," others relating to the word "heir," *simpliciter*, and others relating to the words "heirs of the bodies," which, in fact, is the expression here used ; but I think that those cases show satisfactorily that at all events with regard to the word "heir," or the words "heirs of the body," the expression is flexible—that if used in a limitation of real estate it means what we technically understand by the expression used, as the party answering the description of heir, general heir, or heir-at-law, or heir of the body ; but where it is used in a limitation of the property which is at the time of the limitation personalty or by the terms of the

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limitation directed to be enjoyed as personalty, and to devolve as personalty, which is the case now before me—there the word “heir” may mean and will be held to mean, subject to anything which the context may show to the contrary, next of kin; and “heirs of the body” will mean those next of kin who are issue of the testator’s body, that is, children. The case of *Price v. Lockley* is very specific on the point. Therefore, I shall declare that in the case of Susannah Warne, who is the only one of the three daughters to which this applies, the children are entitled to take in substitution. I ought to mention, before I conclude my observation upon this, that I do not think I could have construed these words otherwise, simply by reason of the limitation that follows with regard to the share given in favour of the children of a deceased daughter Mrs. Hobson; I think some corroboration of this view may be derived from that clause where the testator, after giving to the three daughters who were then living, or to the “heirs of their bodies should they be taken away before the time of our demise,” refers to the fact that he had had a fourth daughter, Mrs. *Hobson, who was dead at the time of making the will and had left two children, and he directs these two children shall take what he calls “their late mother’s share of my property.” He explains it thus: “I will and bequeath to my grandsons John and James Hobson what should have been the mother’s part had she outlived me.” Now it is very unlikely, I do not say it is impossible, but it is very unlikely, that with regard to that one share, he should mean, because Mrs. Hobson had pre-deceased him, it was to go not to the heir of her body properly so called, that is, her eldest son in substitution for her, and with regard to the other three if they should happen to pre-decease him and his wife, the share of any one of those should go not to the children generally, but to the eldest son as being the heir of her body in the technical sense of the term; I say that I derive some corroboration from that clause; although if it had been clear that there was no ground for putting a different interpretation on the word “heir,” I doubt whether I should have been able to vary it by there being this clause as to the children of Mrs. Hobson in the will. Therefore, being of opinion that the children of Mrs. Warne are entitled to take in substitution for her, I shall declare the distribution ultimately to be upon that footing

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May 3.

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DREW v. LONG (1).

(22 L. J. Ch. 717—720; S. C. 17 Jur. 173; 1 W. R. 318.)

A testator gave a sum of money to trustees on trust to pay the income to his wife for life, and then to divide the capital between his three daughters; one of the daughters who was married, died; her husband became bankrupt in 1839, and died before the tenant for life. When the tenant for life died, a bill was filed by the assignees of the husband against the defendant, who was the administrator of both husband and wife, claiming to be entitled to a third of the money left by the testator: Held, that the husband was absolutely entitled in right of his wife to the reversionary interest expectant upon the death of the tenant for life, although that interest was not reduced into possession; and that the assignees had the same right to receive the money as the husband would have had.

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THE bill stated that Joseph Greenhill, by his will, dated in the year 1824, bequeathed the sum of 900*l.* to certain trustees upon trust to pay the interest to his wife for life, and after her decease to divide the principal equally between his three daughters, one of whom was Eliza Long, the wife of Charles Long; that Eliza Long died in the year 1831, leaving her mother the tenant for life and her husband surviving her; that the said Charles Long became bankrupt in 1839, and died in 1844 without having obtained his certificate, and the widow of the testator died in 1850; that the defendant Joseph Long, upon the decease of the testator's widow, took out administration to C. Long and his wife Eliza, and thereupon became possessed of the 300*l.*, being the third part of a sum of 900*l.* given by the testator J. Greenhill equally between his three daughters upon the decease of his widow.

This bill was filed, by the assignees of the bankrupt, C. Long, against J. Long, the administrator of C. Long and his wife, praying that they might be declared entitled to the said sum of 300*l.*, and to the interest thereof which had accrued due since the decease of the tenant for life. The defendant, in refusing to give up the 300*l.* to the plaintiffs, alleged that as C. Long had died before the decease of the tenant for life, the 300*l.* which was a chose in action of the wife had never been reduced into possession, and the assignees could not, therefore, be entitled to it; that C. Long was improperly made a bankrupt, as he was not a trader within the meaning of the Bankrupt Acts, and that although C. Long had been declared a bankrupt so long ago as 1839, the defendant had still a right, under the statute 12 & 13 Vict. c. 106, to dispute the bankruptcy, and that notice had been given to the assignees of an intention to dispute the bankruptcy within the proper time.

(1) *In re Lambert's Estate* (1888) 39 Ch. D. 626, 57 L. J. Ch. 927, 59 L. T. 429.

Mr. Terrell, for the plaintiffs. * * *

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Mr. Saunders, for the defendant.

[*Bevan v. Lewis* (1), *Purdew v. Jackson* (2), and other cases, were cited.]

KINDERSLEY, V.-C.:

My opinion is, that the plaintiff is entitled to a decree. Mrs. Long, the wife of Charles Long, the bankrupt, was, at the time of her death in 1831, entitled absolutely to a reversionary interest in one third of 900*l.* expectant upon the death of her mother, the wife of the testator in the cause. If she had survived her husband and the tenant for life, she would have been entitled absolutely to the legacy as against the parties claiming under the husband, because her husband never reduced *it into possession; but when she died in 1831, leaving her husband surviving her, the effect was that the reversionary interest vested in him absolutely, *jure mariti*; and though he would have been unable to get it from the trustees who held it under the will of the original testator without administering to his wife, still it was a vested interest, and so continued up to the time of his bankruptcy in 1839. It was the same thing as if he had bought a reversionary interest belonging to a stranger about which there could be no question. At the time of the bankruptcy in 1839, assuming it to be valid, the right to the reversionary interest vested in his assignees. In 1844, about five years after the *fiat* in bankruptcy, the bankrupt died, which did not in the least affect the interest in the assignees, the right being already vested in them. In 1850 the tenant for life died, whereby the reversionary interest became an interest in possession, and the assignees therefore became entitled to a vested interest in possession in the one third of the 900*l.* It is true they would have been unable to receive it from the trustees until they or some other person had taken out administration to the wife. The defendant did administer to the wife and also to the husband, and by such administration he was able to give a good discharge to the trustees; and he accordingly received from them the money as administrator of the wife and held the fund in that capacity, subject to such right, if any, as any other person might have, and only as trustee for such other person. The assignees, however, had the same absolute right to receive the money beneficially as the bankrupt would have had if he had not

[*719]

(1) 27 R. R. 205 (1 Sim. 376).

(2) 25 R. R. 1 (1 Russ. 1).

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become bankrupt; and the administrator of the wife was a trustee of the money for the husband's representatives. This bill was filed in December, 1852, by the assignees against the administrator, calling upon him to pay. The defendant insisted that the plaintiffs were not entitled even as assignees, because the husband never reduced the reversionary interest into possession and could not have done so. Now, for the reasons which I have mentioned, I do not think it was necessary that the husband should have reduced the reversionary interest into possession provided the wife pre-deceased him, as her death vested all her personalty, her reversionary choses in action, and all her property of a like nature in her husband. In fact, in this respect, reversionary choses in action stand upon no other footing than any other. The reason why it was impossible for the husband to become entitled to it immediately was, that it was a reversionary chose in action; and unless both had survived the tenant for life, and Mrs. Long had pre-deceased her husband, he could not have reduced it into possession. The case of *Purdew v. Jackson* and the other cases on that subject have long been the standing authorities, and although there previously was a notion that there might be a constructive reduction, yet it was shown that that was impossible where a tenant for life was living; and it was merely because it could not be reduced into possession that the representative of a husband leaving a wife surviving would not be entitled. My opinion, therefore, is that there being no reduction into possession did not prevent the beneficial interest from surviving to the husband or being an absolute reversionary interest in his assignees.

It was next contended that, although the *fiat* and proceedings in bankruptcy took place and the assignees, the plaintiffs, were appointed, the adjudication was, in point of fact, invalid, because the alleged bankrupt was not a trader, and although it purported to be regular it was invalid and good for nothing. It is not disputed but that, as the law stood at the time when the *fiat* issued, supposing there had been no alteration, in order to impeach the validity of a bankruptcy, proceedings must be taken within a certain time. If a creditor intended to dispute, he was bound to do so, within a limited period, and unless he did so, the adjudication was conclusive. That would have been the case here, but it was argued that the 12 & 13 Vict. c. 106, had altered the state of circumstances and the rights of parties with respect to all bankruptcies. Now, that Act expressly reserves the case of parties under prior proceedings and

prevents them being affected by it; the right, therefore, of the assignees of the bankrupt which accrued to them in 1839 vested in them the right to that property, which was first reversionary and then in possession, and that right was not affected, or taken away by *the passing of the late statute. It would be a monstrous supposition that the Legislature should, by this *ex post facto* Act, take away vested rights in assignees, which are, in fact, the rights of creditors, and say that, although the bankruptcy was in 1839, many years before the passing of the Act, the adjudication being conclusive and the rights vested in the assignees, it should have intended to alter the law retrospectively. My opinion, therefore, is, that the 12 & 13 Vict. c. 106, did not affect the rights which the assignees had, and which entitled them, on the death of the tenant for life, to have possession of this share or legacy. With respect to giving notice, it is true the Act requires that, in order to entitle a party in an action or suit to dispute the validity of the bankruptcy, he must give certain notice; but that does not mean that because you give the notice, you may dispute it when you could not otherwise. A party must have the right, and the notice alone would not confer that right. The plaintiffs, therefore, are entitled to the relief which they ask: that is, a declaration that they are entitled to the legacy or the security upon which it may be invested, and the income accrued due since the decease of the tenant for life.

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[*720]

DAY v. DAY (1).

(22 L. J. Ch. 878—882; S. C. 1 Drewry, 569—575.)

1853.
June 2, 5.KINDERSLEY,
V.-C.

[878]

[*879]

A testator gave all his residuary estate to trustees, upon trust to pay the proceeds to his wife for life, and after her decease upon trust to sell the property and to stand possessed thereof, as to one seventh part, in trust, to lay out and invest the same in a Government annuity for the life of his son, and *upon further trust to pay such annuity when and as the same should become payable, not by anticipation, to his said son, for his life, for his own use; but the testator declared that in case his son should, either before or after his (the testator's) death, become bankrupt or insolvent, or should do any act to incumber the annuity, then the property was to go over to other persons. The testator's son survived the testator and died in the lifetime of the tenant for life, without having become bankrupt or insolvent and without having done any act to incumber the annuity: Held, that his personal representatives were entitled to the property (2).

THIS was a special case, under Sir G. Turner's Act, for the purpose of having a question determined under the will of

(1) The report of this case here taken from 22 L. J. Ch. 878, is more satisfactory than the report of the same

case in 1 Drew. 569.—O. A. S.

(2) This case was not followed in *Power v. Hayne* (1869) L. R. 8 Eq. 262,

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David H. Day, dated the 29th of June, 1842, whereby the testator gave all his freehold, copyhold, and leasehold messuages, tenements, and hereditaments, and all the residue of his personal estate and effects whatsoever, to his wife, Mary, and his sons, T. H. Day, J. Day, and the Rev. J. D. Day, their executors, administrators, and assigns, upon trust, to pay the annual proceeds thereof to his wife for life, and after her decease, upon trust, to sell and convert into money his said estates, and to stand possessed of the proceeds thereof, upon trust, as to one-seventh part, to lay out and invest the same in a Government annuity for the life of his son C. Day; and, upon further trust, to pay such annuity when and as the same should become payable, not by anticipation, to his said son, C. Day, for his life, for his own use; but he declared that, in case his son C. Day should have assigned, incumbered, or in any manner disposed of, or anticipated, or should at any time or times thereafter assign, incumber, or in any manner dispose of or anticipate the said annuity so to be purchased as aforesaid, or any part thereof; or in case his said son, C. Day, should at any time or times thereafter, either before or after the testator's death, become bankrupt or take the benefit of any Act for the Relief of Insolvent Debtors, or do, or cause to be done, any other act which could, should, or might affect or incumber the said annuity, then and in any or either of the said cases he declared and directed that his trustees for the time being should hold or stand possessed of the said annuity, upon trust, for his three sons, T. H. Day, J. Day, and J. D. Day, for their own use and benefit. The testator gave the other six-sevenths of his property amongst his other children and the children of such of them as should be deceased.

The testator, at his death, left his widow and his son C. Day him surviving.

C. Day died in January, 1844, without having committed any of the acts specified in the will of the testator. The widow died in January, 1852, and the question was, who was entitled to the share of C. Day, which was claimed by the three sons of the testator, to whom the property was given over, in the event of any of the specified acts being done by C. Day; the children of the testator to

or in *In re Mabbett* [1891] 1 Ch. 707, 60 L. J. Ch. 279, 64 L. T. 447, but notwithstanding those cases it seems that where the intended purchase of a testamentary annuity is defeated by the death of the annuitant, his repre-

sentatives may claim the price or value unless it is otherwise disposed of by the will: see *In re Robbins* [1906] 2 Ch. 648, 75 L. J. Ch. 751, affirmed [1907] 2 Ch. 8, 76 L. J. Ch. 531, 96 L. T. 755, C. A.—O. A. S.

whom the other six-sevenths were given; the representatives of C. Day, and the next of kin of the testator?

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Mr. Berir appeared for the three sons of the testator.

Mr. Woodhouse, for the persons entitled to the other six-sevenths, [cited *Bayley v. Bishop* (1), *Yates v. Compton* (2), and other cases, which will be found stated and considered by the LORD CHANCELLOR in *Dawson v. Hearn* (3)].

Mr. Hobhouse appeared for the personal representatives of C. Day, and

Mr. Smythe, for the next of kin of the testator.

KINDERSLEY, V.-C.:

The case I have now to decide is quite a new case; and there being no authority, I believe, applicable to it in specie, I must, to the best of my judgment, draw my conclusion from the principle which seems to be established by the authorities, which are, to a certain extent, the same, but differ in one very material point,—on which the argument turned. The testator, after giving his residuary real and personal estate to trustees, and directing the income to be paid to his wife, Mary Anne Day, for her life, directs that after her decease the whole of *his property should be converted and divided into seven shares; six-sevenths are given to certain individuals, about which it is not material to consider, but their shares were, at all events, vested, notwithstanding those parties might not have survived the tenant for life. Then followed a trust to invest one-seventh in a Government annuity for the life of the testator's son, C. Day. So far there was no gift to him, and then comes a declaration that, in case C. Day should have assigned, &c. (and these are the same words that are used in the previous gifts), then in trust for three others of the testator's sons. It seems that C. Day survived the testator, but died in the lifetime of the tenant for life, without having either disposed of, anticipated, assigned, or incumbered the annuity, or become bankrupt or insolvent, or done any act to incumber, or any one of those things upon the doing of which the testator expresses his intention that the annuity should go over to the other sons. Under these circumstances, the tenant for life now having died, and that one-seventh having to be disposed of, there are four classes of claimants.

[*880]

(1) 7 B. R. 132 (9 Ves. 6).

(3) 32 B. R. 295 (1 Russ. & My. 606).

(2) 2 P. Wms. 309.

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First, the three sons to whom there is a gift over in the event of C. Day assigning, incumbering, or disposing of the annuity, or becoming bankrupt or insolvent. Now, having heard counsel for that class, my opinion is, that they can have no claim, because by express terms it is only to take effect in the event of C. Day doing some one or other of those acts; and if no such act is done by C. Day, they cannot claim, and that appears to me to exclude them in the events which have happened.

The second class consisted of parties to whom the other six-sevenths were given. Now, it does not at all follow that, because there was a failure of one gift, each of the other persons to whom one-seventh is given should take a sixth. It may be that the gift fails and is undisposed of, but that never can increase the share when only one-seventh is given to each. It appears to me that this class is necessarily and clearly excluded.

The difficulty arises upon the remaining two classes, one being the representatives of Day himself, and the other the next of kin of the testator, who, of course, if the gift to C. Day does not take effect would be entitled. I have to consider, therefore, whether this gift took effect in favour of C. Day in the events which have happened, and whether the one-seventh is undisposed of and goes to the next of kin.

Now, the authorities have clearly determined, and the counsel for the next of kin admitted very fairly, that on the authority of *Bayley v. Bishop*, which comes nearest to this case on the point of there being a gift of a certain sum (it being of no consequence whether it is a share of the residue or not) to trustees, upon trust, to pay the income to a tenant for life, and after his death a direction to invest and lay out the same, as in this case, in the purchase of an annuity for the life of A. B., and a direction to pay the annuity to A. B. during his life, A. B., if he survives the tenant for life, has a right to say "don't lay it out, but give me the sum itself;" and even more than that, if the annuitant should die in the lifetime of the tenant for life, his representatives have a right to ask for the fund out of the assets in specie. Therefore, those cases establish this principle, that in such a case, notwithstanding the direction to lay it out in the purchase of an annuity for the life of the party, and notwithstanding that there is no gift of the fund, but a direction to pay the annuity, which is so purchased, there is a vested interest in the party to whom it is directed to be paid, and he, if he survive the tenant for life, or his representative, if he die

first, would be entitled. The case is the same as a gift of 500*l.* to A. B. on the death of the tenant for life, which becomes a vested interest in A. B.

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If that were all in the present case, there could be no doubt; the difficulty here is, that the testator, by reason, as I think it may be imagined, of mistrusting the prudence of his son Charles Day, not only directs one-seventh to be laid out in the purchase of an annuity for the life of Charles Day, but further directs that it shall be only paid to him as it becomes payable, and not by anticipation; he expresses his desire that Charles Day shall not be entitled by anticipation to deprive himself of the benefit during his life, but to receive *de anno in annum* the instalments *of the annuity as it should arise; he clearly expresses that intention irrespective of the gift over. Now, without adverting to the gift over, one question is, whether the expression of that intention varies the case from what it would have been without that expression of intention; assuming it was for his own personal use, does that vary the case in principle from those which I have already adverted to? Suppose he had survived the tenant for life, and the annuity had been bought, would it have prevented his assigning the next day? and would not his assignment to a purchaser have conveyed an absolute title? I apprehend it would. It is true, in the case of a female, a clause of anticipation may be superadded, but it is unknown to the law that it can be done in the case of a male; he has a right to assign and make a good title to it even before it falls into possession. If, then, there had been no limitation over in the event of Charles Day assigning or incumbering the annuity, I should be clearly of opinion that the expression of intention that there should be no assignment, even if it had been a distinct prohibition, would not have prevented the case from falling within the principle of *Bayley v. Bishop*, and the other cases.

[*881]

What remains for consideration is, the effect of the gift over even in the event of an insolvency or bankruptcy. The testator contemplated this—that Charles Day might become bankrupt or insolvent even in his, the testator's, lifetime, and such bankruptcy or insolvency would make the seventh share or annuity to be bought with it, pass to the assignees, and so not come to the hands of Charles Day, and in that event he means the gift to be to the other three sons. It appears to me he contemplated also, in the language he uses, that in the life of the testator, Charles Day might have assigned; and no doubt a man may execute a deed, by which he

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means to assign over to another, in consideration of a sum of money, all the benefit derived under a will, (whether it is valid or not is not necessary to discuss,) or he might do some act besides becoming bankrupt in the life of the testator and tenant for life, the effect of which would be, to take the property away from himself and vest it in some other person claiming under him, and, therefore, he has introduced the limitation, and expressed a declaration that in case he should have assigned, &c. it should go over. A material point has been suggested that, supposing in the testator's life or, after his death, in the lifetime of the tenant for life, Charles Day had become bankrupt, could there be a doubt, on the construction of the will, that the three sons would have been entitled to say—"give us that seventh share"? I think not. Indeed, the testator has expressed in terms—that if Charles Day before he knew that anything had been given to him, became a bankrupt, the gift was to go over, and then the three other sons would have been entitled to an absolute vested interest on the death of the tenant for life. How then is it with respect to Charles Day's representatives, or what have they after the testator's death? How am I to regard this limitation for the purpose of determining when Charles Day had a right in that one-seventh? On the death of the tenant for life it was given to be laid out by the trustees in the purchase of a Government annuity for his life, and paid to him; if there had been nothing more, that was a vested interest in the event of his surviving the tenant for life, and the limitation over, in the event of his doing the thing pointed out, would operate irrespective of that event, because it would equally operate before or after the death of the tenant for life,—unless, indeed, as has been argued, you can say that the clause against anticipation and the gift over in such event, are to be treated as amounting to an express condition that the gift is not to take effect at all unless the party does survive the tenant for life. It does not appear to me that I can consider the terms of the bequest as expressive of a necessity to preserve the share for the personal benefit of Charles Day. The gift over affects the principle upon which the Courts have determined, that a direction to lay out in the purchase of an annuity makes it imperative for the party to survive the period when such laying out takes place. I am of opinion, therefore, that the gift takes effect, notwithstanding that Charles Day died before the tenant for life; and inasmuch as he died without being bankrupt or insolvent, the event upon which it is given over not having happened, the representatives of Charles

Day are entitled to the one-seventh share which is now in question. As to the costs, I think that all parties ought to have their costs out of this share.

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ABBOTT v. CALTON.

(22 L. J. Ch. 936—937.)

1853.
July 25.

WOOD, V.-C.
[936]

Where a purchaser objects to specific performance of the contract for sale upon other grounds than those of title, and fails, and the vendor does not make out his title until after decree, the purchaser is liable to the costs of the vendor's suit for specific performance, except the costs of making out the vendor's title.

CLAIM by vendor, for specific performance of a written agreement, by the defendant, to purchase the "Three Crowns Inn" at Market Harborough, Leicestershire, for 500*l*. At the original hearing, in July, 1851, the usual decree was made for specific performance of the contract, with a reference to inquire whether a good title could be shown to the premises, and when first shown. The Master, by his report, in November, 1852, found that a good title could not be made by the plaintiff, and the latter having excepted to the report, the exceptions were allowed by Vice-Chancellor TURNER in December, 1852, and the report ordered to be reviewed, and the reference directed by the original decree ordered to be further prosecuted before the Judge at chambers. By the certificate of the chief clerk in March, 1853, approved by the VICE-CHANCELLOR, it was certified that a good title could be made by the plaintiff; and that it was first shown in October, 1852. The defendant resisted the completion of the contract upon several grounds, but did not object to the plaintiff's title until the cause came into the Master's office, and the defendant had previously to the commencement of the suit, tendered a draft conveyance to the plaintiff, who had objected to it. The question of waiver of objection to the title not having been raised by the claim, the usual reference as to title had been made on the authority of *Clive v. Beaumont* (1).

The cause now came on for further consideration, and the principal question was as to the costs of the suit.

Mr. Rolt and *Mr. Metcalfe*, for the plaintiff, contended that the defendant, having resisted the performance of the contract upon other grounds than want of title, and failed, was liable for all the costs of the suit, or at least, all costs beyond those of making out

ABBOTT the plaintiff's title. [They cited *Croome v. Lediard* (1), *Scoones v.*
 v.
 CALTON, *Morrell* (2), *Monro v. Taylor* (3), *Abbott v. Swarder* (4).]

Mr. Bacon and *Mr. De Gex*, for the defendant, submitted that as there must be a reference to chambers to settle the conveyance, the matter was still as much open as it was before the institution of the suit, and that, pending the settlement of the conveyance, the Court would not deal with the costs. [They cited *Wilson v. Allen* (5), *Wilkinson v. Hartley* (6).]

Wood, V.-C. said he must follow the rule laid down in the cases cited on behalf of the plaintiff. The contest in some degree arose upon the question of conveyance, which was still unsettled; and there was reason to suppose that this question might possibly have been settled. But when the claim was filed, other objections were raised by the defendant to the specific performance of the agreement, and the defendant objected to complete at all, and contended that he was not bound to take the plaintiff's title. The question of title had then passed, and the only question was, as to the conveyance to be made by the plaintiff. If at the hearing the defendant had said that he only objected to the form of the conveyance, a decree might have been made to settle the conveyance, and the costs of the suit would have followed the result. But the question now raised was, in fact, that there was not any contract. This question was *paramount to that of title, and if a question was raised prior to the question of title, the vendor would not be called upon to perfect his title, and the costs of establishing the prior question would fall upon the party who failed. The defendant has taken his chance of success upon the prior ground—and, having failed, must pay the costs of the suit, except the costs of the exceptions and of the affidavits adduced by the plaintiff in support of his title.

[*937]

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| (1) 39 R. R. 195 (2 My. & K. 293). | (4) 87 R. R. 439 (4 De G. & Sm. 448). |
| (2) 49 R. R. 351 (1 Beav. 251). | (5) 21 R. R. 255 (1 J. & W. 611). |
| (3) 85 R. R. 194 (8 Hare, 51). | (6) 92 R. R. 374 (15 Beav. 183). |

CATON *v.* LEWIS.

(22 L. J. Ch. 946—947; S. C. 1 W. R. 118.)

Under an order for production of documents, the denial upon oath of the relevancy of concealed passages will not be sufficient; and upon the Court itself ascertaining that they might possibly refer to the questions at issue, an order was made upon the defendant *for the production of the concealed passages, with costs.

1853.
Jan. 7, 13, 15.ROMILLY,
M.R.

[946]

[*947]

THIS suit was instituted by cestuis que trust to remove the trustee and to make him responsible for a breach of trust. The defendant, in the schedule to his answer, set out various documents, which he admitted to be in his possession and submitted to produce. Under the usual order several documents were produced, among which were two letters, in each of which passages were sealed up to prevent inspection, and the defendant refused to allow them to be uncovered on the ground that they related to family affairs and did not relate to the matter at issue.

Mr. R. Palmer and *Mr. Greene*, for the plaintiff, now moved to commit the defendant for disobeying the order to produce.

Mr. Selwyn :

The defendant has upon affidavit denied the relevancy of the passages sealed up, and that denial upon oath ought to satisfy the plaintiff, and it ought also to entitle the defendant to the same protection as if the objection had been taken by the answer.

THE MASTER OF THE ROLLS :

The letters have been left with me, and after inspecting the passages sealed up, I think they may possibly have reference to the question at issue, and that the plaintiff is entitled to see them. I shall, however, not make any order for committal, but I shall direct the defendant to produce the whole of the letters, and he must also bear the costs of the application.

IN RE PROPERT'S PURCHASE (1).

(22 L. J. Ch. 948—949; S. C. 1 W. R. 237.)

Leases were granted to A. B. for certain terms of years. He subdemised to C. D. for the terms, less ten days. C. D. mortgaged to E. F. & Co. for securing money, and subdemised for the last-mentioned terms, less one day, with a power of sale, and covenanted to assign the last day of each

1853.
March 9.KNIGHT
BRUCE,
TURNER,
L.JJ.

[948]

(1) It appears from the judgment of 420) that the mortgage in this case
WOOD, V.-C. in *In re Carpenter* (Kay, also contained the usual covenant by

**In re
PROPERTY'S
PURCHASE.**

term to a purchaser. The mortgagees (E. F. & Co.) sold to G. H. and assigned the mortgage terms. G. H. then bought of A. B. the improved ground rents, and took an assignment of the leases granted to him. C. D., the mortgagor, being abroad, G. H. petitioned under the Trustee Act (13 & 14 Vict. c. 60) that the Court would vest the last day of each of the terms, created by the underlease to C. D. in the petitioner: but the COURT, concurring in the opinion of WOOD, V.-C., dismissed the petition.

THIS was a petition, under the Trustee Act, 1850 (the 13 & 14 Vict. c. 60), which stated that by six several indentures of lease, dated respectively 14th of February, 1845, made between Charles Proctor, Esq. of the one part and William Kingdon of the other part, six several messuages situate, &c., were demised to W. Kingdon, his executors, administrators and assigns, from Christmas, 1844, for the respective terms of ninety-two years and three-quarters, less ten days, at and subject to certain rents and covenants; that by an indenture, dated the 1st of February, 1847, made between William Kingdon of the one part, and Sir Claude Scott & Co. the bankers, of the other part, all the same messuages and premises, with other hereditaments, were granted, assigned, and demised to Scott & Co., their executors, administrators and assigns, for all the residue of the same terms of years granted by the leases of the 14th of February, 1845, "save and except the last day of each of the said several terms," subject to a proviso for redemption on payment of the principal and interest at the times mentioned; and upon default it was declared, that it should be lawful for the mortgagees at any time thereafter, without prejudice to their right to foreclosure, or to the exercise of any other rights of a mortgagee, if they should think proper, to sell the hereditaments by auction or by private contract, &c., and out of the money raised to pay expenses, the mortgage-money, and interest, and the surplus, if any, to the mortgagor. And the deed contained a covenant by William Kingdon with the mortgagees, their executors, administrators or assigns, that he would, if any sale were made under the power, if required, "assign and dispose of the said pieces or parcels of ground, messuages, or

the mortgagor to stand possessed of the nominal reversion in trust for the mortgagee and his assigns in case a sale was made under the power. The omission of that clause from this report seems unaccountable. In mortgages under Lord Cranworth's Act made between the 28th August, 1860, and the 1st January, 1882, the omission may be immaterial: see *In re Solomon*

and *Meagher's Contract* (1889) 40 Ch. D. 508, 58 L. J. Ch. 339, 60 L. T. 487, but in mortgages made since 1881, the declaration of trust by the mortgagor should now be sufficient to meet the difficulty: *London and County Banking Company v. Goddard* [1897] 1 Ch. 642, 66 L. J. Ch. 261, 76 L. T. 277.—O. A. S.

In re
PROPERT'S
PURCHASE.

tenements, and other hereditaments and premises, for the then residues of the terms created by the said indentures of lease, as such purchaser or purchasers shall direct." The petition then stated the death of one of the mortgagees and the sale, by private contract, by the survivors, pursuant to the power, of the leasehold hereditaments comprised in the leases and contained in the mortgage; and that, by a deed, dated the 8th of July, 1852, made between them of the one part and John Propert, Esq., the petitioner, of the other part, the same were, in consideration of 5,100*l.*, assigned to him for all the residue and remainder of the *terms of years granted and demised by the mortgage deed of the 1st of February, 1847, subject to the rents and covenants in the original leases; that in June, 1852, the petitioner purchased of Charles Proctor (the lessor), for 6,000*l.*, the improved ground rents of 50*l.* each for the six houses demised by the six leases, and thereby became the owner of the premises for all the residues of the terms of ninety-two years and three-quarters created by the leases under which Charles Proctor held the same, dated the 14th of January, 1845. The petition then submitted that, under these circumstances, William Kingdon (the lessee and mortgagor) was a trustee for the petitioner of the last day of each of the terms granted by the leases of the 14th of February, 1845, and that the petitioner was entitled to have an assignment executed to him of the last day of each such terms; and stated that William Kingdon was then residing in France and out of the jurisdiction of the Court. It was then prayed that it might be ordered that the six houses and the appurtenances should be vested in the petitioner for the last day of each of the terms granted by the leases of the 14th of February, 1845.

[*949]

Mr. Elderton, in support of the petition, stated that the matter had been brought before Vice-Chancellor Wood, who had declined to make any order, but gave permission for it to be mentioned to their Lordships. The learned counsel submitted that, although the case did not come in words within the scope of the Trustee Act, yet it did so in spirit, for there could be no doubt that the mortgagor was a trustee of the remaining terms of one day each for the purchaser, and as such would be compellable, by a suit in this Court, to assign them; and if the Court did not make the order asked, the petitioner must, in order to make a complete title in himself to this valuable property, for which a sum of no less than 11,000*l.* had been paid, file a bill for the specific performance of the covenant to assign

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PURCHASE.

these reversionary terms contained in the mortgage deed. Vice-Chancellor Wood expressed doubts on the propriety of making the order, and therefore declined to make it, but said that perhaps other Judges of the Court might see their way to comply.

LORD JUSTICE KNIGHT BRUCE:

Vice-Chancellor Wood has already doubted on this point, and certainly, I think, with very good ground. What is asked is, in effect, this: to make a decree for specific performance of this covenant without the defendant, or the person who should be defendant, in the suit, having any notice of what is done. Hard cases are known to make bad law, and I think we had better not so act in this hard case as to make bad law. With every wish to do what is asked, my learned brother and myself agree that it is quite out of the question to comply. I never before heard that a covenant to assign makes a covenantor a trustee; and if it were so, I see no reason why a man who has covenanted to pay debts should not be held to be a trustee of his own estate for the payment of his own debts. I think the petition must be dismissed.

LORD JUSTICE TURNER:

I entirely concur, that no such order as is asked can be made, and that therefore the application must be refused.

1853.
May 7.

IN RE THE LAMBETH CHARITIES (1).

(22 L. J. Ch. 959—961.)

TURNER,
KNIGHT
BRUCE,
L.JJ.
[959]

A testator gave rents and profits to the parson and churchwardens of a parish, to be given and disposed of to and among the most needy and poor people of it, according to the discretion of the parson and churchwardens for the time being. By a scheme, half was directed to be applied in maintaining certain schools, and half in pensions to aged and necessitous parishioners. Under the Church Building Act, the parish was divided into thirteen districts, the mother church being one; and the Master directed, in amending the scheme, that the charity estate should be divided among the several districts, and that as the pensions became vacant, the money should be applied by the local incumbents and churchwardens respectively for education of the poor, but so that half the pensions assigned to each district should be retained. One of the VICE-CHANCELLORS modified this order by directing that the proceeds of vacant pensions should be at the discretion of the incumbents and churchwardens for education or pensions

(1) *In re Compton Charities* (1880) 18 Ch. D. 310, 50 L. J. Ch. 646, 45 L. T. 152.

according to the wants of the districts: Held, upon appeal, that the view of the Master was correct, and that it was the duty of the Court to have regard to the primary intention of the testator, namely, the benefit of poor and needy persons of the parish.

In re
THE
LAMBETH
CHARITIES.

THIS cause came before the Court, upon an appeal from a decision of Vice-Chancellor KINDERSLEY. The suit was of long standing, and related to the administration of the Wallcott estate belonging to the parish of St. Mary, Lambeth, and its several districts. All the facts needful to be stated are, that Edward Wallcott, citizen and haberdasher of London, by his will, dated the 3rd of January, 1667, gave the rents and profits of seventeen acres of freehold land, and one acre of copyhold land, covered with buildings, to his father for life, and after his decease, as to one moiety thereof, to the parson and churchwardens of the parish of Lambeth and their successors for ever, and directed the rents and profits of that moiety "to be given and disposed of to and among the most needy and poor people of the said parish, according to the discretion of the parson and churchwardens of the same parish for the time being." By an Act, 1 Geo. IV. c. 32, it was enacted, that the rents and profits should be disposed of and applied as near to the intention of the will as might be. In 1834 a scheme was approved, by which half the then amount of annual rents, namely, 250*l.* a year, should be applied for the maintenance of certain schools, and 250*l.* a year in pensions to sixteen aged and necessitous persons *of the parish, of unexceptionable character, of sixty years old or above, housekeepers of the parish at a rent of not less than 20*l.* a year during seven years, and who had never received parochial relief, and who belonged to the parish. The funds increased, and so in proportion the pensioners and schools were increased. The parish was divided into thirteen districts under the provisions of the Church Building Acts; and upon a reference sent to Master Tinney upon the modification of the scheme, he decided that the Wallcott estate should be apportioned among the thirteen districts into which Lambeth was at present divided, and that as those portions of the trust estate which had (under a former scheme) been assigned to pensioners would become vacant by deaths, &c., the monies thus released should in consequence of the great need of educational endowment, be placed at the discretion of the local incumbent and churchwardens of each district, and so be assignable for the education of the poor, provided that at least one-half of the pensions assigned to such district should be retained. Vice-Chancellor KINDERSLEY confirmed Master Tinney's report, with this modification: that the proceeds of all vacant

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pensions should, in accordance with the terms of the founder's will, be at the discretion of the parson and churchwardens, and so assignable either for education or for pensions, according to the wants of each district. From this decision of the VICE-CHANCELLOR, the Rev. Mr. Dalton, the rector of the mother church, and the churchwardens appealed, insisting that the report of Master Tinney ought to be affirmed as more in accordance with the founder's intention. On the other hand, the district incumbents were in favour of the VICE-CHANCELLOR'S view.

Mr. Bacon and Mr. R. W. E. Forster, for the appellants.

Mr. Glasse, Mr. Rogers, and Mr. Martineau, for the district incumbents, who were the respondents.

Mr. Wickens, for the *Attorney-General*, supported the view of the respondents.

LORD JUSTICE KNIGHT BRUCE :

It is always with the most unaffected diffidence that I differ from the judgment of Vice-Chancellor KINDERSLEY, and on occasions when I do differ from him upon subjects of this nature, upon which on every ground he is so well fitted to form a judgment, it is with particular distrust. But so far as I may say so, consistently with my respect for him, having no doubt upon the subject, I am prepared now to dispose of it; and I am rather encouraged in doing so, because I am about to act in conformity with another judgment entitled to the very highest respect—I mean the judgment of Master Tinney. Now, the provision which was directed, according to the former scheme, to be granted to certain poor persons, seems to be regulated by so much good sense, so much propriety, so much regard to the interests of society, that it cannot, in my opinion, be questioned that these are solid advantages tending to encourage meritorious and industrious conduct amid the privations and temptations of poverty. A charity, therefore, so excellently regulated as this was, is, in my opinion, a blessing. It is not the less proper that it comes directly and popularly, as well as legally, within the meaning of the words used by the testator. The other most useful object, which is, in a sense, in competition with this, is the education of the poor children of the parish, provision for which is also a great blessing, as I take it, under wise and judicious regulations. It must not be forgotten, however, that, though a part of this fund is employed for this object, yet it is rather by a deflexion

from the true meaning of the language and the proper intention of the original founder than in direct pursuance of it—a deflexion, perhaps, which, if it had had a worse object, could hardly have been altogether excusable. Fortunately, however, the deflexion, if deflexion it be, is now sanctioned by the law. Still, it seems to me, with great deference, that, when there is a question as to which of the two objects the fund is to be applicable, we ought to favour the most direct and obvious object of the testator. It seems to me that, agreeing with the propriety of administering the charity, to a certain extent, by providing for the poor children of the parish the inestimable blessing of education, it is not required by the due administration of this will, or by the wants of the parish, or by *the interests of society, wholly to apply the funds of the charity to that purpose. My opinion is, that the other excellent and valuable purpose which I have already mentioned may be carried out without giving up the object of education. I differ with great deference from the Vice-Chancellor, as I should have done from Master Tinney if he had coincided with the Vice-Chancellor, but I am disposed to adopt the view of the Master.

[*961]

LORD JUSTICE TURNER:

I need hardly say that I always differ with great regret from the judgment of Vice-Chancellor KINDERSLEY, and more especially upon a subject of this nature, to which I know he has given his particular attention. It is my duty, however, to form the best opinion I can upon the subject myself. Now, it has been argued as if in this case we were not entitled to disregard the scheme of 1834. I pay no attention to that argument. The question is, what was the intention of the testator? He has by his will directed the rents and profits of a moiety of his estate to be given to the rector and churchwardens, to be disposed of by them to and among the most needy and poor people of the parish, according to their discretion. The question is, whether there can be, and whether this Court ought to sanction it, an application of the funds for the purposes of education, if the Court is satisfied that that purpose was not the primary purpose of the testator? That primary purpose was that the application of the funds should be in aiding and maintaining the poor and needy persons of the parish. But, I think, when we look at this will, that it is impossible to doubt but that the primary intention was to relieve the poor persons by a distribution among them of the rents and profits, and not by applying the funds to

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the education of the children. To that view I think it my duty to conform. Now, it is said that this cannot be done, because in one of the districts into which the parish is divided—namely, Norwood—there is but one pensioner, and that there is no provision for education. What is the consequence of this? Why, that the fund is scarcely sufficient for the primary purpose which the testator intended to carry into effect, and this being so, is it right to apply the funds to other than the primary purpose? I think not, and, therefore, that the Court ought not to direct the application of this fund to the purposes of education without the primary object of the testator being first carried into effect. Upon this principle, I think this fund ought not to be applied otherwise than the Court will allow it to be applied. I am of opinion that the conclusion of Master Tinney is the right one, and that his report in this respect must be restored.

1853.
June 7.
KINDERSLEY,
V.-C.
[1020]

WHITEHEAD v. RENNETT.

(22 L. J. Ch. 1020—1022; S. C. nom. *Whitehead v. Bennett*, it seems rightly, 1 Eq. R. 561; 1 W. R. 406; 21 L. T. O. S. 178.)

A testator gave and devised to trustees all his freehold, leasehold and personal property, upon trust to sell, and the money arising from such sale was to be invested for the benefit of his three daughters; the interest thereof to be paid to each of them for their lives, and on the decease of each of them one half of the fund or share to be paid to the children of each daughter so dying, at the age of twenty-one, and the other half to such grandchildren for life only, and afterwards to their children at twenty-one: Held, that the gift to the children of grandchildren was void for remoteness; that the daughters did not take an absolute interest, and that the undisposed of portion of the real property went to the testator's heir.

SAMUEL BARKER, by his will, dated the 21st of November, 1834, appointed Joseph Todd, Edward Loyd, Benjamin Braidley and Robert Bennett, to be his trustees and executors, to whom and their heirs, executors and administrators he gave, devised and bequeathed all his freehold, leasehold and personal property upon trust to sell, when and as they should think proper. The testator then gave several annuities and legacies, and continued: "All the money arising from the sale of my freehold and leasehold estates, and the money arising from my personal estate not consisting of money, as well as all my monies, to be invested for the benefit of my three daughters, Maria Whitehead, widow, Anne Bennett, wife of Robert Bennett, and Mary Bennett, wife of Charles Bennett, and the interest thereof to be paid to each of my said daughters during their

respective natural lives without the controul of their husbands, and on the decease of each of them *I do will and direct that one-half of the fund or share from which interest or the income thereof is hereby directed to be paid to the parent respectively for life as aforesaid, shall be paid to the children of each of my daughters so dying, equally, at the age of twenty-one years. And it is my will that the interest of the other half shall be paid to the children of each of my daughters for their respective lives, and on the decease of my said grandchildren respectively, the share of which they, my said grandchildren, are only to receive the interest thereof for life as aforesaid, to be paid to their children respectively when and as they attain their respective ages of twenty-one years."

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[*1021]

The testator died, leaving, his three daughters, Maria, Anne and Mary surviving him.

Maria and Anne were still living and were defendants to the suit, but Mary died in 1837, before the suit was instituted, leaving four children, who were also made defendants.

There were several great-grandchildren of the testator, one of whom was born after the testator's death.

The first question was, whether or not the gift to the testator's great-grandchildren was void for remoteness. The next question was, whether the three daughters of the testator took absolute interests under the will. There was also a question as to the rights of the children of Anne, inasmuch as some of them might die in their mother's lifetime, but which, under the circumstances, it was not necessary to decide at present.

Mr. Daniel and *Mr. Berkeley* opened the case on behalf of the trustees.

Mr. Follett and *Mr. Bazalgette*, on behalf of the daughters of the testator, contended that they took an absolute interest in the property left by the testator, and that the gift to the great-grandchildren, being to the children of unborn children, was void for remoteness.

The following cases were cited: *Ring v. Hardwick* (1), *Mayer v. Townsend* (2), *Campbell v. Brownrigg* (3), *Harvey v. Stracey* (4), *Carver v. Bowles* (5).

Mr. Bacon and *Mr. Shapter*, for the eldest son of Mary, the

(1) 50 R. R. 202 (2 Beav. 352).

(4) *Ante*, p. 588 (1 Drew. 73).

(2) 52 R. R. 180 (3 Beav. 443).

(5) 34 R. R. 102 (2 Russ. & My. 301).

(3) 65 R. R. 390 (1 Ph. 301).

WHITEHEAD ^{c.} deceased daughter, submitted, that upon the death of the daughters of the testator their interest was exhausted, and that the heir of Mary took the undisposed of share of the real estate, as real estate and not as personalty: *Johnson v. Woods* (1), *Fitch v. Weber* (2).

Mr. James, Mr. Smythe, Mr. Haddan, Mr. Hodgson and Mr. Bury appeared for different defendants.

KINDERSLEY, V.-C. :

It seems impossible to argue that the limitation to the great-grandchildren is not void. Indeed, that question has scarcely been pressed. There is no doubt whatever about this general principle, that if a residue or sum of money by way of legacy, be given or appointed to A. by a testator in the first instance, and then there is a modification of that gift, or a limitation over for the benefit of persons, the issue of the parties, although those subsequent limitations may fail, no doubt, the first gift, which was an absolute gift, would prevail, no matter whether it was a gift or an appointment under a power. The question here, then, really is this, whether there is such a gift to the party in the first instance, as to come within the principle and the authorities cited? Is there a gift to one daughter or to each of the daughters of a third part of the money, and then a limitation of the share thus given in the first instance absolutely, in such a form as that it falls within the principle, so as to make each of the daughters entitled to the benefit of the first absolute gift? In the first place, it is very questionable whether a direction to invest for the benefit of the daughters subject

[*1022]

to *these limitations, would amount to an absolute gift. It seems clear that a gift to invest for the benefit of A., B. and C. would be enough if it stopped there, but it does not follow that a mere direction to invest, followed by the limitations in this will, would be an absolute primary gift, but where there is a gift to invest for the benefit of daughters, how can I say the testator meant to make an absolute gift to the daughters as joint tenants, and then to go on and limit, not that gift in joint tenancy, but one half of the third share to the children of one, and then as to the other moiety of that third, to the children of that one for life? Can I say that the testator meant it to be an absolute gift with that sort of limitation, even if it were a joint tenancy? What he meant was, that this money should be invested for the benefit of his daughters, and then

(1) 2 Beav. 409.

(2) 77 R. R. 56 (6 Hare, 145).

he directs how they are to derive that benefit. He does not express that he has given a share to each for life; he carefully abstains from that, and speaks of it as the share, the income of which is given to the daughter for life. Therefore, I think, taking all the will together, though I admit that a clear direction to invest for the benefit of A., B. and C. would be an absolute gift to them, yet that, in this case, there is not an absolute gift to the daughters, and that the principle of the cases cited is not impeached. I acted on this principle myself in the case of *Harvey v. Stracey*, and should do so again if the same circumstances occurred; but I do not consider this case within the principle. I ought to have observed that the other question, as to the rights of the children of Anne, does not arise. I think I am bound to say that it is clear, whatever the testator does not dispose of goes to the heir of the testator *quâ* heir, because he is entitled to every portion of the testator's real estate which is undisposed of. There was the case of *Pitch v. Weber*, where the testator charged his estate for the benefit of certain persons, and it was held that the heir was entitled to the benefit of what was undisposed of, because it was part of the testator's real estate, and he is entitled to it whether conversion has taken place or not.

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v.
RENNETT.

IN RE THOMAS.

(22 L. J. Ch. 1075—1076.)

Two infants having been sent to England for their education, by their father, who was resident in India, the COURT appointed a guardian of the children, to act for the father during his absence abroad, notwithstanding *that their mother was residing in this country.

1853.
July 16.
Aug. 3.
KINDERSLEY,
V.-C.
[1075]
[*1076]

THIS was a petition for the appointment of a proper person to act as the guardian of the two infant petitioners, whose father was alive, and following his profession in the East India Company's Civil Service in India, from whence he was not likely to return for many years.

Mr. Daniel and *Mr. Prendergast*, for the petitioners, stated that the petition had been rendered necessary because the mother of the children, who resided in England, had improperly interfered with the directions of their father respecting their education. The two children were of the respective ages of thirteen and eighteen. The father was desirous that his daughter, aged eighteen, should be sent out to India to him, and she was not unwilling to go. Under these

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circumstances, it was asked that the Court would sanction the arrangement being made in obedience to the father's wishes.

Mr. Nugent appeared for the mother of the petitioners.

The VICE-CHANCELLOR having, at the request of the counsel, had an interview with the mother of the children and with the intended guardian, made an order, appointing a confidential friend of the father to act as guardian of the children during his absence from England, and directed that steps should be taken for sending out to India the daughter, under suitable protection, in obedience to the wishes of her father.

TRAIL v. BULL.

(22 L. J. Ch. 1082—1084; affg. 1 Coll. 352.)

1853.
March 21, 23.
April 20, 23.
May 25.

Lord
CRANWORTH,
L.C.
[1082]

The widow of a testator, who was his executrix and also legatee for life of certain leaseholds, with a limitation over on her death to the testator's children, entered into possession of the leaseholds, and received and applied the rents to her own use. From the Master's report, it appeared that the widow, during the whole of her life, had been in advance to the testator's estate: Held, upon appeal, confirming the decision below, that, under the circumstances, such receipt and application of the rents did not constitute an implied assent to the legacy.

THIS was an appeal from a decision of PARKER, V.-C., upon exceptions to the Master's report; and the principal question was, whether, under the circumstances, the executors could be held to have assented to the bequest of certain leasehold houses.

Charles Salmon, by his will, dated in March, 1834, bequeathed to his wife all his personal estate for her own use, except two leasehold houses, which he gave to his wife for her life, and after her death directed the same to be sold, and the proceeds divided among his four children; and he appointed his wife and Thomas Bull his executrix and executor.

The testator died in October, 1834, leaving his widow and four children surviving him. The widow alone proved the will, and got in the personal estate, and entered into the possession of the leasehold houses and received the rents up to the time of her death. It appeared that the executrix carried on the testator's business, using the assets for that purpose.

In October, 1836, the widow died; and in 1837 administration to her estate was taken out by a creditor. Thomas Bull, after the widow's death, proved the testator's will, and sold the two leasehold

houses, and paid over to three of the children three-fourths of the produce of such sale, the legatees giving him an indemnity. The fourth child, the plaintiff, Mrs. Trail, refused to give him the indemnity required; and the executor declining to pay over her share, it was invested in the sum of 458*l.* Consols.

TRAIL.
BULL.

Thomas Bull died in March, 1840, having, by his will, appointed his wife his sole executrix, who proved his will, and thereby became the representative of Charles Salmon and Thomas Bull.

The bill was filed by Mrs. Trail, by her next friend, against Mrs. Bull and other parties, claiming to be entitled to the 458*l.* Consols as her fourth share of the produce of the leasehold houses, insisting that Mrs. Salmon and also Thomas Bull had assented to the legacy, and that, therefore, she was not bound to indemnify the executrix and executor against any outstanding liabilities of the testator Charles Salmon.

A decree was eventually made, directing the Master to take the general accounts, and to inquire and state whether the specific bequest of the leaseholds had been assented to by the executrix or executor or either of them. The Master, by his separate report found that the executrix and executor had assented to the bequest, *and by his general report it appeared, that Mrs. Salmon was during her life largely in advance to the testator's estate.

[*1083]

The cause came on to be heard, before Parker, V.-C., upon exceptions, both to the general report and the separate report, when his Honour was of opinion, among other things, that there had been no assent to the bequest either by Elizabeth Salmon or Thomas Bull. The exceptions were then brought on, by the plaintiff, by way of rehearing, before the Lord Chancellor.

Mr. Cooper and Mr. Tripp, for the plaintiff.

Mr. James Russell and Mr. Boyle, for the defendants.

[The following authorities were cited: *Hayes v. Sturges* (1), *Chalmer v. Bradley* (2), *Lord Saye and Sele v. Guy* (3), *Richards v. Browne* (4), *A.-G. v. Potter* (5), *Smith v. Day* (6), *Elliott v. Elliott* (7), *Barnard v. Pumfrett* (8), *Lepard v. Vernon* (9), *Clegg v. Fishwick* (10).]

(1) 17 B. R. 491 (7 Taunt. 217).

(2) 20 B. R. 216 (1 J. & W. 51).

(3) 6 B. R. 563 (3 East, 120).

(4) 43 B. R. 719 (3 Bing. N. C. 493).

(5) 59 B. R. 448 (5 Beav. 164).

(6) 46 B. R. 747 (2 M. & W. 684).

(7) 60 B. R. 653 (9 M. & W. 25).

(8) 48 B. R. 230 (5 My. & Cr. 63).

(9) 13 B. R. 13 (2 V. & B. 51).

(10) 84 B. R. 61 (1 Mac. & G. 294).

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May 25.

THE LORD CHANCELLOR :

Upon general principles it is clear, that, when an executor, who is also a specific legatee, takes possession, *primâ facie* he does so in virtue of his character of executor, and not in that of legatee. His right to possession, as executor, is certain ; but it is not certain that he has or will have any other right. It is his duty to take possession as executor ; it is neither his duty nor his right to take possession as legatee, till he has satisfied the testator's debts, or has ascertained that the assets are sufficient for that purpose. These reasons abundantly warrant the general proposition I have mentioned, as to the title to which an executor's possession is *primâ facie* to be referred. But the executor, having taken possession, may afterwards expressly, or by implication, elect to treat his possession as that of legatee, and not of executor ; and that, whether he be entitled to the subject-matter of the legacy absolutely, or for a qualified interest only, with a limitation over to others. In the latter case it is certain that the assent of the executor in general enures, not only for his own benefit, but for the benefit also of those who take after him.

Mrs. Salmon was, during her life, sole acting executrix, and also legatee for life of the leaseholds, and residuary legatee. Immediately upon the death of the testator, she entered into possession of and received the rents of the leaseholds, and also took possession of the other property, to which, subject to the payment of debts, she was absolutely entitled. Her possession in the first instance is certainly to be attributed to her character of executrix. She died two years after the testator ; and the question is, whether in the interval she did any act whereby she altered the nature and quality of her possession. Such a change of the nature of her possession may be evidenced either by a formal act of assent, or by conduct or dealing with the property inconsistent with her character as executrix. Formal assent there was none, and the sole question therefore is, whether an assent is to be implied from her mode of dealing with the estate. The acts relied upon as showing an intention to hold the property as legatee, and not as executrix, are, first, the receipt of the rent of the leaseholds, and the appropriation of those rents and the other property to her own use ; secondly, the receipt of the rents in her own name, and not as executrix ; and thirdly, her having spoken of the leaseholds as being her own for life, and as going after her death to her children under the will. The *appropriation of the rents to her own use would

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have been a circumstance of considerable weight as inferring an assent, if the state of the assets had not been such as to show that she had a right so to appropriate the rents, independently of her title as legatee. By the Master's general report it appears that she was at all times largely in advance to the testator's estate; and in such a state of things the mere fact of her appropriating these rents to her own use does not evidence any assent to receive them in any other character than that of executrix. The same observation applies also to her appropriation of the general residuary estate; for there can be no residue while the assets collected are not sufficient to discharge the debts. The question here is not about the prudence or propriety of her dealing with the testator's estate, *ex. gr.* her carrying on the testator's trade, but whether the circumstances justify the inference that she had assented to the bequest of the leaseholds so as to make herself personally responsible to creditors as for a *devastavit* in case of the assets proving deficient. The circumstance of her always being largely in advance to the estate, would make such an inference most unreasonable.

I think no weight can be attributed to the fact, that in the receipts which she gave for the rents she did not describe herself as executrix. The object of the receipt was to satisfy the parties making the payments, and in form it was perfectly adequate for this purpose, and there was no necessity for doing more than signing her own name; and I observe that a receipt for rent, which had fallen due in the testator's lifetime, and to which she could only be entitled as executrix, was signed by her exactly in the same form. This circumstance, therefore, will afford no inference of assent. And, lastly, as to her conversations upon the subject of these leaseholds, I can only infer that it was her expectation that she should be able to discharge her husband's debts out of the general assets so as to leave the leaseholds as a provision for herself and her children; but I cannot go the length of inferring from these conversations that she intended absolutely to withdraw these leaseholds from the liability attaching to them, and to make herself personally responsible for her husband's debts. I therefore come to the same conclusion with Vice-Chancellor PARKER, that having regard to the conduct of Mrs. Salmon and the state of the general assets, there is nothing to warrant the conclusion that she assented to the bequest; and I think it is still more certain that no assent was ever given by Mr. Bull. After the death of Mrs. Salmon, he took upon him the executorship for the sole benefit of the cestuis que trust; and his

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whole conduct in the transaction shows that he never intended to assent to the bequest, except upon receiving the indemnity. In the view that I have taken, the second question, namely, whether the assent of Mrs. Salmon would be binding upon Mr. Bull without his consent does not arise, and I give no opinion upon it.

IN THE QUEEN'S BENCH.

REG. v. EDWARD SMITH.

IN RE BOREHAM (1).

(22 L. J. Q. B. 116—118.)

1853.
Jan. 19.

Bail Court.

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The father of an infant agreed to let it live with its uncle, who was to maintain and educate it until it was enabled to provide for itself, and the father promised not to take the child away from the uncle, and to pay a certain sum monthly for its support. The agreement was acted on for some months: Held, that notwithstanding the agreement, the father was at liberty to revoke his consent to the child's living with its uncle, and that the Court, on the child being brought up on *habeas corpus*, was bound to deliver it to its father.

A writ of *habeas corpus* was obtained by Nathaniel Boreham, and directed to Edward Smith, commanding him to produce the body of Emma Susan Boreham. The return showed the following facts: Emma Susan Boreham, born in 1847, was the daughter of Nathaniel Boreham and Susan his wife, who was the sister of Edward Smith. In May, 1852, an agreement was entered into between N. Boreham and E. *Smith, by which, reciting that the wife, being dangerously ill, with the consent of her husband, requested Smith, her brother, in the event of her death, to take charge of and educate and bring up her infant daughter, which he had agreed to do on condition that the daughter was permitted to remain with him until she was grown up and able to provide for herself, it was witnessed, that in consideration of the agreement by Smith, N. Boreham did solemnly promise and agree with Smith that he would permit and suffer the said E. S. Boreham to reside and live with the said Smith until she should be grown up and able to provide for herself, and that he would not in any way interfere with the said Smith in the bringing up and education of his daughter, nor remove nor seek to remove her from the care of the said Smith, but would at all times permit her to remain with him as his adopted child; and further, that he would pay to Smith 14s. per month for the support and education of the said E. S. Boreham. There was a proviso that N. Boreham might visit and have access to his said daughter at all reasonable times. The return showed that the mother, S. Boreham, died in July, 1852, and that, by virtue of the agreement, Smith took possession of the daughter, and has taken charge of her and maintained her ever since.

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(1) Cited, *In re Andrews* (1873) L. R. 8 Q. B. 153, 158; S. C. 42 L. J. Q. B. 99, nom. *In re Edwards*; 28 L. T. 353.

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The child was brought into Court, and the case argued (January 18) by—

Henniker, in support of the return :

The contract by the father, that he would give up the child to her uncle to be educated and brought up, and that he would not take her out of her uncle's custody, is a sufficient answer to this application, and precludes the father from asking the assistance of this Court to enforce his paternal right. Secondly, the affidavits show that the father was at one time a dissolute character.

(ERLE, J. : If they do not impeach his character as a fit person to have charge of the child at the present time, that second objection cannot avail you. I should wish to hear the other side on the first point.)

Prentice, on behalf of the applicant :

A father is entitled to the custody of his child. He is its natural and legal guardian.

(ERLE, J. : He is entitled to its custody against all persons who unlawfully deprive him of it ; but here he has agreed that the child shall remain with its uncle.)

This agreement, if binding, amounts to an assignment of the child. It is contrary to law and principle and public policy that a father should be able by contract to deprive himself of his rights over his children. The contract can only subsist so long as it is not revoked. Here the father has revoked it.

(ERLE, J. : Is there any authority that a father may, by means of a *habeas corpus*, put an end to such an arrangement as this ?)

Rex v. De Manneville (1) show that where a wife has separated from her husband, the father may, by *habeas corpus*, compel her to deliver the children up to him even when being nursed at the breast.

(ERLE, J. : In that case there was no contract that the wife should retain the children. In some cases of separation it is agreed that the father shall keep the sons and the mother the daughters. Has any Court laid down the law that the father can afterwards obtain a *habeas corpus* and take the daughters from the mother ?)

(1) 7 R. R. 693 (5 East, 221).

The case of *Rex v. Greenhill* (1) is very strong to show that the father is entitled to the custody of his children, and to take them even from the mother. The observations of the Court, it is submitted, go the full length now contended for. *Ex parte Skinner* (2) is a very strong case. There the Court refused to interfere and deliver up the child to the mother, although the father had treated his wife with great cruelty and lived with another woman, and it had been agreed between them, before a Judge at chambers, that the child should be placed in the care of a third party, from whose custody the father had obtained the child by fraud. This Court does not possess the peculiar jurisdiction of the Lord Chancellor with regard to the custody of infants, who represents the Crown as *parens patriæ*. If this agreement be not revocable, how great would be the hardship on the father if Smith, the uncle, ill-used the child. But it is submitted that the agreement is revocable, *and it is clear that the father has revoked it as far as he can.

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Henniker, in reply :

None of the cases which have been cited go further than this, that when the father has possession of the child this Court cannot take the child from him. But it is a very different proposition to say that this Court will interfere actively to give a child to its father in breach of an agreement by the father that he will not demand it back.

(ERLE, J. : As this question involves an important point, I should wish to look into the authorities.)

Cur. adv. vult.

ERLE, J. now said :

I have looked into the cases which have been decided on this subject, and it seems to me that the arrangement between the father and the uncle is in the nature of a consent given by the father that the uncle should have the custody of the child and a contract by the father to pay the uncle for its support. I am of opinion that the father is at liberty to revoke that consent, and I am bound to say that he is entitled legally to the custody of his child. The child must be delivered up to its father.

(1) 43 R. R. 440 (4 Ad. & El. 624).

(2) 27 R. R. 710 (9 Moore, 278).

1853.
Jan. 29.

REG. v. HARWOOD (1).

(22 L. J. Q. B. 127—128.)

Bail Court.

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When a cause is heard before a county court Judge without a jury, and a new trial is afterwards granted generally at the instance of the plaintiff, the latter may demand to have the case tried by a jury on the second occasion.

THIS was a rule for a *mandamus* to C. Harwood, Esq., the Judge of the Margate County Court of Kent, requiring him to hear a cause. The case was tried in the first instance, at Margate, without a jury, before the county court Judge, who found for the defendant, but afterwards granted a new trial. The plaintiff then gave due notice of his intention to try the cause on the second trial before a jury, and the defendant consented to such a mode of trial. When the cause was called on, the Judge declined to allow the case to be tried by a jury, as he had given no permission to have it so tried; and the case consequently was not tried at all. The affidavits, on showing cause, disclosed that there was no list of jurors furnished, according to the directions of the statute, to the clerk of the county court; that the sheriff of the county of Kent had no authority to summon jurors in the jurisdiction of the Cinque Ports, within which Margate was situated. But it also appeared that it was the practice for parties to sign a consent that the jury should be summoned from the special jury list of Dover; and that *a consent had, in fact, been signed by both parties in this case, and with reference to the second trial; and that the clerk of the Court had summoned a jury accordingly.

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Montagu Chambers and *Simons* showed cause:

There are two objections to the *mandamus* issuing: first, that as the Judge merely granted a new trial generally, it must be taken that he meant a new trial of the same kind as the first. It is optional with the Judge to grant a new trial, and when he does so to impose such terms as he shall think reasonable: statute 9 & 10 Vict. c. 95, s. 89 (2). Secondly, there was no proper jury to try the cause. The clerk of the Court never had received a list of jurors from the sheriff according to section 72 (3), which requires the sheriff to make out a list of persons qualified to serve as jurymen at the Assizes, residing within the county court district, and to

(1) Foll. *Ford v. Taylor* (1877) 3 C. P. D. 21, 24, 25, 47 L. J. C. P. 116, 1888, s. 93.
37 L. T. 431; and see C. C. R. 1903, (3) See now County Courts Act, 1904, Ord. XXII. r. 1, Ord. XXXI. r. 2. 1888, s. 102.

deliver such list to the clerk of the Court, from which list the clerk is to summon the jury. The Judge, therefore, was justified in refusing to allow the case to be tried by a jury, as there was no jury which according to the statute could be obtained to try it. The consent of the parties could not give jurisdiction.

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Lush, in support of the rule:

The consent signed by the parties removed all difficulty about the constitution of the jury. But the Judge never put that objection forward as his ground for refusing to try the cause, for he rested his refusal simply on the ground that he had not given leave to try it by a jury. The statute gives either party a right to try the cause by a jury. * * *

ERLE, J.:

The ground taken by the county court Judge was, that he was empowered to refuse to try the case by a jury. I think that on that point he was wrong. The right of the parties being to have a jury, it was the duty of the Judge to have postponed the trial, if necessary, until a proper jury could have been summoned. The parties have the same right on a second as they have on the first trial, to require a jury to be summoned.

Rule absolute.

IN THE COURT OF COMMON PLEAS.

MONTAGUE *v.* PERKINS (1).1853.
June 3.

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(22 L. J. C. P. 187—190; S. C. 17 Jur. 577; 1 W. R. 437; 21 L. T. O. S. 185.)

The defendant, in 1840, gave S., for value, his acceptance in blank, on a 5s. stamp. S., in 1852, and, as the jury found, not within a reasonable time, filled in his own name as drawer, for 200*l.* at five months. The defendant, being sued on the bill by an innocent indorsee for value, pleaded, first, that he did not accept; secondly, the Statute of Limitations: Held, that the plaintiff was entitled to the verdict on both issues, notwithstanding the finding of the jury.

THE declaration stated, that one Henry Swinburn, on the 1st of September, 1852, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to the said H. Swinburn or order 200*l.* five months after date, and the defendant accepted the said bill, and the said H. Swinburn then indorsed the said bill to one John Huskisson, and the said J. Huskisson then indorsed the said bill to the plaintiff, but the defendant did not pay the same.

Pleas, *inter alia*, that the defendant did not accept, and that the alleged cause of action did not accrue within six years before this suit.

The cause was tried, before Jervis, Ch. J., at the sittings for London, on the 15th of May last, when the plaintiff produced the bill, written on a 5s. stamp, which bore date the 6th of March, 1835, and proved that the acceptance was in the defendant's handwriting: the body of the bill was in Swinburn's handwriting. On the part of the defendant, it was proved that previous and down to the year 1840, the defendant had occasionally accepted bills for Swinburn's accommodation, and had given him others accepted in blank, to take up those bills when due, but that he had never executed anything in blank since 1840, and never heard of the bill in question till October, 1852. The jury having found that the bill was given in 1840, and not filled up till 1852, and not within a reasonable time, the verdict was entered for the defendant on the issues raised by the first and second pleas, and leave was reserved to the plaintiff to move to enter the verdict for him.

Byles, Serjt., on the 26th of May, obtained a rule *nisi* accordingly; against which

(1) Cited, *London and South Western Bank, Ltd. v. Wentworth* (1880) 5 Ex. 25 Ch. Div. 666, 54 L. J. Ch. 138. See D. 96, 102, 49 L. J. Ex. 657; *Carter v. White* (1882) 20 Ch. Div. 225, 227 (affd. Bills of Exchange Act, 1882, s. 20 (2)).

Channell, Serjt. and *Archibald* now *showed cause:

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The defendant does not deny that a man who issues a blank acceptance *primâ facie* gives authority for the filling up of that acceptance with the amount that the stamp will bear: *Collis v. Emmet* (1), but the mere writing a name across a bill stamp does not of itself constitute a bill. It amounts to no more than evidence of an authority to fill it up, and that within a reasonable time; for, according to the principle upon which *Roberts v. Bethell* (2), was decided, the drawing and acceptance are to be taken to have been within a reasonable time of each other. If so, then it was a question for the jury whether the authority had been in this case pursued: *Muilman v. D'Eguino* (3). In *Temple v. Pullen* (4) the question whether a blank promissory note had been filled up within a reasonable time was left to the jury, and the Court said, "It was entirely a question for them what was reasonable under the circumstances."

(MAULE, J. referred to *Mellish v. Rawdon* (5).)

Here the jury have found that the bill was not filled up within a reasonable time, i.e. not within the time limited by the authority. The case, therefore, is not distinguishable from *Awde v. Dixon* (6). There the defendant agreed to join his brother in making a promissory note for his accommodation, provided R. would also join. The defendant accordingly signed an instrument in the form of a promissory note, a blank being left for the name of the payee. R. refused to join; and afterwards the defendant's brother delivered the imperfect instrument to the plaintiff for value, representing that he had authority to deal with it, and the plaintiff's name was inserted as payee. The Court held, that the plaintiff could not recover on this note against the defendant. ALDERSON, B. said, "A blank acceptance is not of itself an authority to make a complete bill, but only evidence of authority: *Molloy v. Delves* (7). Here the defendant signed his name to a piece of paper, giving his brother authority to make it a promissory note on certain terms; he makes it a note on other terms."

(CRESSWELL, J.: The defendant there never consented to his

(1) 1 H. Bl. 313.

L. J. C. P. 29).

(2) 22 L. J. C. P. 69.

(6) 86 R. R. 523 (6 Ex. 869; 20

(3) 2 H. Bl. 565.

L. J. Ex. 295).

(4) 91 R. R. 546 (8 Ex. 889).

(7) 7 Bing. 428; 9 L. J. C. P. 171.

(5) 35 R. R. 579 (9 Bing. 416; 2

MONTAGUE name being made use of, unless R. would also join. He gave his
 PERKINS. brother only a conditional authority.)

So here, the condition annexed to the authority is to fill the paper up within a reasonable time.

(CRESSWELL, J. : This does not differ from the case of a merchant employing an agent to sell a cargo of cotton for him, the agent being held out to the world as having a general authority to sell. His principal may have given him private instructions, but if in selling the agent violates his instructions, his principal is nevertheless bound.)

As to the second plea, the defendant was at liberty to show the real date when the bill was accepted: *Steele v. Mart* (1). The real date was 1840, and the Statute of Limitations began to run at the expiration of five months from that time.

(MAULE, J. : You must contend that the right of action accrued before the bill was drawn, for the bill was not filled up till 1852.)

Byles, Serjt., in support of the rule:

The rule must be absolute to enter the verdict for the plaintiff on the second issue.

(JERVIS, Ch. J. : There is nothing in the point made as to the of Limitations.)

Then, as to the first plea, the defendant's blank acceptance was a letter of credit to Swinburn for any amount limited by the stamp: *Russel v. Langstaffe* (2). There it was held that an indorsement written on a blank note or cheque, will bind the indorser for any sum and time of payment which the person to whom he entrusts the bill chooses to insert in it. When the bill gets into the hands of a *bonâ fide* holder for value, any limitation of authority between the drawer and acceptor cannot be inquired into. In that respect the present case is distinguishable from *Aude v. Dixon*. The plaintiff there *was not a *bonâ fide* holder for value, and PARKE, B. points that out in his judgment. In *Schultz v. Astley* (3) it was argued, that by giving a blank acceptance the acceptor only

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(1) 4 B. & C. 272.
 (2) 2 Doug. 514.

(3) 42 B. R. 651 (2 Bing. N. C. 544;
 5 L. J. C. P. 130).

authorized the party to whom it was given to draw the bill, and no other; but the COURT held, that it did not lie in the mouth of the acceptor to say that the drawing was irregular. The same principle is established by *Cruchley v. Clarence* (1), where the defendant drew a bill on M., leaving a blank for the name of the payee, and the plaintiff, a *bonâ fide* holder, filled in his own name; the COURT held that the defendant, by leaving the blank, undertook to be answerable for it when filled up in the shape of a bill. The same point was decided in *Attwood v. Griffin* (2).

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(CRESSWELL, J.: Suppose the defendant had lost this blank acceptance, would he have been liable upon it if the finder, without his authority, had filled it up?)

Yes, to an indorsee for value without notice; as where A., by false representations, induced B. to sign his name to a blank stamped paper, which A. afterwards secretly filled up as a promissory note for 100*l.*, and induced C. to advance him 100*l.* on it, GARROW, B. held that C. had his remedy on the note against B.: *Rex v. Revett* (3). With respect to the time within which a blank acceptance may be filled up; if a man issues a blank acceptance the day before he dies, the drawer may fill it up, as of a day before the death, and a *bonâ fide* holder may recover against the executor: *Usher v. Dauncey* (4). There A., a member of a firm, drew a bill in blank in the name of the partnership firm, payable to their order, and having likewise indorsed it in the name of the partnership firm, delivered it to a clerk to be filled up for the use of the partnership. After A.'s death, and the surviving partners had assumed a new firm, the clerk filled up the bill, inserting a date prior to A.'s death: Lord ELLENBOROUGH held, that the surviving partners were liable as drawers of the bill, to a *bonâ fide* indorsee for value.

(JERVIS, Ch. J.: No doubt. The power there emanated from the partnership, the death of one member of it did not annul an authority given by him on behalf of all the others.)

The bill here must be taken to have been filled up before the acceptance was written: a man is not bound to see which was written first, nor to ascertain the date of the stamp. In fact,

(1) 14 R. R. 596 (2 M. & S. 90).

(3) Byles on Bills, 103, 6th ed.

(2) 31 R. R. 669 (Ry. & M. 425; 2 Car. & P. 368).

(4) 15 R. R. 729 (4 Camp. 97).

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unless the defendant can show that the plaintiff is not a *bonâ fide* holder for value, he cannot say that this was a blank acceptance at all. This is an answer to *Temple v. Pullen* and *Mulhall v. Neville* there cited, even if those cases are to be taken as deciding anything.

Fortescue, on the same side, was not called upon.

JERVIS, Ch. J. :

It seems to me that I was wrong at the trial in directing the verdict to be entered for the defendant, and that I ought to have directed it to be entered for the plaintiff, although the jury might have been right in finding that the bill was not filled up within a reasonable time, and I might have been right in leaving that question to them, on the authority of *Temple v. Pullen* and *Mulhall v. Neville*. It is admitted by my brother Channell, that the giving a blank acceptance is evidence of an authority to the party to whom it is given to fill up the bill for the amount, and it may be for the time, to which the stamp extends; but he contends that the authority so given is an authority to fill it up within a reasonable time, and that as the authority in this case was not pursued in that respect, the party giving the acceptance is not liable. I think that is not the case with reference to the rights of a *bonâ fide* holder for value. The rules applicable to the question of authority on this bill of exchange do not differ from those which ought to govern the question if it arose in the ordinary case between principal and agent. In the case of a blank acceptance, *primâ facie* the person giving it gives the person to whom it is given an opportunity to fill it up for the amount, and for the time limited by the stamp laws. As between those two

[*190] *there may be secret stipulations binding upon them, but not binding as between the public and the person giving the blank acceptance. As said by Lord ELLENBOROUGH, in *Cruchley v. Clarence*, the defendant has chosen to send the bill into the world in that form, and the world ought not to be deceived by his acts. How does this differ from the ordinary case of an agent, held out to the public at large as competent to contract for and to bind his principal? The agent may have secret instructions, but notwithstanding he deviates from them, the principal is bound by his acts. So here, the defendant, when he put the blank acceptance into Swinburn's hands, gave the latter power to issue it as if he had a general and unlimited authority; and the defendant must be bound

by the acts of his agents to whom he gave this power. This is what is said by Lord MANSFIELD in *Russel v. Langstaffe*, that an indorsement on a blank note is a letter of credit for an indefinite sum. The cases of *Temple v. Pullen* and *Mulhall v. Neville* are not at variance with this. For these reasons, I am of opinion that the rule must be absolute to enter the verdict for the plaintiff.

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MAULE, J. :

I think so too. The defendant, when he wrote his name in blank and issued this acceptance, must have known, what was obvious to anybody, that he put it in the power of any person to whom he gave it to fill it up, and pass him off as having accepted the bill for any amount at any time warranted by the stamp. He must be taken to have intended the natural consequence of his act. If this were not so, and a *bonâ fide* holder were not to be protected, then a person who had used the utmost care might be subjected to a loss, in order to relieve another who had used no care, but had put the person to whom he gave the acceptance in a position to impose upon the most innocent and cautious. No case has been cited which decides the contrary ; and I think we may without any conflict with previous cases, and in affirmance of a principle of mercantile law in favour of the negotiability of these instruments, and to protect innocent holders for value, decide that the defendant is liable, and that this rule should be made absolute.

CRESSWELL, J. :

I entirely agree to this. A person who gives another possession of his signature on a bill stamp, *primâ facie* authorizes the latter as his agent to fill it up, and give to the world the bill as accepted by him. He enables his agent to represent himself to the world as acting with a general authority ; and he cannot say to a *bonâ fide* holder for value, who has no notice of any secret stipulations, that there were secret stipulations between himself and the agent, any more than can a principal, in the case already put, where he enables his agent buying or selling on his behalf, to represent himself as acting under a general authority.

TALFOURD, J. concurred.

Rule absolute.

IN THE COURT OF EXCHEQUER.

SHAW *v.* THE BANK OF ENGLAND.

(22 L. J. Ex. 26.)

1852.
Nov. 10.

[26]

In an action for the infringement of a patent, the Court will not grant an order, under the 15 & 16 Vict. c. 83, s. 42 (1), for an inspection of a machine upon an affidavit "that the machine used by the defendants is the same for which the plaintiff has obtained a patent."

HAWKINS moved, under the 15 & 16 Vict. c. 83, s. 42, for a rule calling upon the defendants to show cause why certain persons, named in the affidavits, should not be allowed to inspect the machine used by the defendants for numbering and paging books. An action is pending for the alleged infringement of a patent belonging to the plaintiff for numbering and paging books; and it is sworn in the affidavit "that the machine used by the defendants for paging and numbering their books is the same for which the plaintiff has obtained a patent."

(*MARTIN, B.*: You mean to say that the word "inspection" in this clause applies to every inspection that the Court thinks it necessary that the party applying should have.

POLLOCK, C. B.: This is a power only hitherto exercised by the Court of Chancery; and now that the Legislature has given to the common law courts the power of granting injunctions, it must be presumed that those powers are to be exercised in the same way as they have hitherto been by the Court of Chancery. Cases have occurred in Chancery when such an injunction as here asked for has been granted.

ALDERSON, B.: The application is, in fact, to get evidence of the infringement. You say to the defendants, produce the machine you use; he does so, and it is an admission that it is used by him.)

The 42nd section gives the Court power to make this order. It enacts that, "in any action in any of her Majesty's superior courts of record at Westminster and in Dublin, for the infringement of letters patent, it shall be lawful for the Court in which such action is pending, if the Court be then sitting, or if the Court be not sitting, then for a Judge of such Court, on the application of the

(1) Rep. Patents Act, 1883 (46 & 47 Vict. c. 57), s. 113; see now Patents and Designs Act, 1907, s. 34.

plaintiff or the defendant respectively, to make such order for an injunction, inspection or account, and to give such direction respecting such action, injunction, inspection, and account and the proceedings therein respectively, as to such Court or Judge may seem fit" (1).

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POLLOCK, C. B. :

The affidavit is too vague and defective for the Court to grant this application. It ought, at least, to state that there is such a machine, and that the plaintiff has reason to believe it is an infringement.

ALDERSON, B., PLATT, B. and MARTIN, B. concurred.

Rule refused (2).

(1) S. 34 of the Patents and Designs Act, 1907, is to the same effect.

was discharged upon a collateral ground, so that no decision was necessary as to the power to order such an inspection.

(2) The rule *nisi* was subsequently obtained on amended affidavits; but

MAGISTRATES' CASES.

1853.
Jan. 22.

[44]

(CROWN CASE RESERVED.)(1)

REG. v. DALE (2).

(22 L. J. M. C. 44—47; S. C. 1 Dears. C. C. 37; 17 Jur. 47; 17 J. P. 68.)

On a conviction under the Alehouse Act, 1828 (9 Geo. IV. c. 61), by justices of a borough which has a separate commission of the peace, but no Court of Quarter Sessions, the portion of the penalty which, by section 26 (3), is to be paid to the treasurer of the county or place for which the justices are acting must be paid to the treasurer of the county in which the town is situated, and not to the treasurer of the borough.

THIS was a case stated from the Northumberland Quarter Sessions to the following effect.

The indictment, which was tried at the last Michaelmas Quarter Sessions for the county of Northumberland, was as follows: Northumberland, to wit. The jurors for our lady the Queen, upon their oaths present, that heretofore, to wit, on the 19th day of May A.D. 1851, in the borough of Tynemouth, in the county of Northumberland, one Joseph Gibbon was convicted before Alexander Bartleman and Solomon Mease, Esq., then and there being two of her Majesty's justices assigned to keep the peace in and throughout the said borough, in the said county, for that he, the said J. G., on the 18th of May A.D. 1851, at the township of North Shields, in the said borough of Tynemouth, he, the said J. G., being then and there an alehouse keeper, and duly licensed to sell exciseable liquors by retail in his house *and premises there situate, did wilfully permit disorderly conduct in his house and premises, by then and there suffering persons, to the number of twenty and more, to remain fighting, drinking and making a great noise and disturbance there at a late hour of the night, to wit, at twelve o'clock at night, against the terms of his said licence, and contrary to the provisions of the statute in such case made and provided. And the said Alexander Bartleman and Solomon Mease, in and by the said conviction, then and there adjudged the said J. G. for his

[*45]

(1) *Coram* JERVIS, CH. J., ALDERSON, B., COLERIDGE, J., CRESSWELL, J., PLATT, B. and MARTIN, B.

(2) Cited, *Mayor of Reigate v. Hart* (1868) L. R. 3 Q. B. 244, 249, 37 L. J. Q. B. 73; *Winn v. Mossman* (1869) L. R. 4 Ex. 292, 298, 301, 38 L. J. Ex. 200, 20 L. T. 672; *R. v. West Riding Justices* [1900] 1 Q. B. 291, 295, 298, 69 L. J.

Q. B. 13; *R. v. Warwickshire Justices* [1902] 2 K. B. 101, 106, 71 L. J. K. B. 505, 86 L. T. 568.

(3) Rep. by Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 75, and see *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50), s. 221, and *Licensing Act*, 1872, s. 66.

said offence to forfeit and pay the sum of 2*l.* 10*s.* to be paid and applied according to law, and also to pay to Robert Mitchell, the complainant, the sum of 10*s.* for his costs in that behalf," &c.

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The indictment further stated "that the said A. Bartleman and S. Mease did, at the time of making the said conviction, award one moiety of the said penalty to the use of the said R. Mitchell, &c. That J. G. afterwards paid the sum of 2*l.* 10*s.* to Henry Dale, the defendant, who was then clerk of the justices for the borough, and that he received the same as such clerk in order that it might be forthwith paid by him to the persons to whom the same must be paid in pursuance of and according to the conviction and the statutes in that case made and provided, to wit, one moiety to the said R. Mitchell as such prosecutor as aforesaid, and the other to the treasurer of the said county." The indictment further added, "that the justices of our lady the Queen, assigned to keep the peace for our said lady the Queen in and throughout the said borough, were at the time of making the said conviction, and thence hitherto have been, acting and empowered to act within the said borough, by and under a commission of the peace from our lady the Queen, which said commission did not, nor does contain any grant of a Court of Quarter Sessions of the peace for the said borough, and our said lady the Queen had not then, or at any time since, granted that a separate Court of Quarter Sessions of the peace should be had in and for the said borough, nor were there, then, nor at any other time, any separate General Quarter Sessions of the peace holden in or for the same." It then alleged that it was the defendant's duty to pay one moiety of the penalty to the treasurer of the county of Northumberland, yet though a reasonable time had elapsed, and the treasurer was always willing to receive the money, that the defendant had neglected and refused to pay it over to him.

There was a second count, the same as the first, but with the additional averment "that the said A. Bartleman and S. Mease in the making of the said conviction acted as such justices as aforesaid for the said county."

The defendant was found Guilty, and a motion was made in arrest of judgment, on the ground that by the statutes it was not the duty of the defendant to pay the moiety of the penalty to the treasurer of the county. The case set out the statute 9 Geo. IV. c. 61, ss. 26, 33, and 37; statute 5 & 6 Will. IV. c. 76, s. 126; statute 11 & 12 Vict. c. 43, s. 31. The case further added, that the borough of Tynemouth was incorporated by Royal charter, dated

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the 6th of August, 1849, and a commission of the peace was granted to certain persons therein named, on the 26th of March, 1850, but no Court of Quarter Sessions was thereby granted. It was admitted, for the purpose of the case, that the defendant had paid over the moiety in question to the treasurer of the borough of Tynemouth. Judgment was postponed.

The question for the opinion of the Court was, whether the defendant was properly found guilty upon the indictment for neglecting and refusing to pay over the moiety of the fine to the treasurer of the county of Northumberland.

Pashley, for the defendant (Nov. 13, 1852):

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The sole question is, whether the defendant was justified, as he contends he was, in paying over the moiety of the fine to the treasurer of the borough of Tynemouth, or whether he ought, as contended for the prosecution, to have paid it to the treasurer of the county of Northumberland. The Act under which the conviction took place, the 9 Geo. IV. c. 61, the Alehouse Act, by section 26, directs that a moiety at least of the penalty imposed by the justice on a conviction shall be paid "to the treasurer of the county or place for *which such justice shall then act." The term "place" in this section includes "town corporate," for section 1 enumerates certain local divisions, including "town corporate," and the other section more comprehensively describes them all as "county or other place." Section 37 (the interpretation clause) in the definition of "county or place" includes town corporate. But it will be said that the definition in that section of "treasurer of a county or place," shows that "place" in this instance means a town corporate, having a separate Quarter Sessions of the peace. The words are, "treasurer of the county or place," shall "be deemed to include any officer acting in such capacity, or charged with the receipt and expenditure of monies, from and out of which the costs of public prosecutions shall have been usually defrayed." The word "or" shows that two classes of persons are meant, either the officer acting as treasurer, though not charged with payment of costs of prosecutions, or the officer who has to pay such costs. In section 29 the treasurer of the county or place, for which the justice has acted, is to pay him his costs on an appeal. It is, therefore, reasonable that the penalty should go to the fund out of which the costs should be paid. There being no separate Court of Quarter Sessions in the borough the county justices may act in it, as the

borough is part of the county : *Reg. v. St. Edmund's, Salisbury* (1), but they act in and for the borough. * * *

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Otter, for the Crown :

The defendant was bound by the Alehouse Act to pay the money to the county treasurer. When justices are assigned to keep the peace for a borough which has no separate Court of Quarter Sessions, they act as justices of the county : *Rex v. Amos* (2). County justices would have a concurrent jurisdiction with the borough justices beyond doubt. It is clear that county justices, acting in the borough, do so by virtue of their general authority as justices of the county, and therefore by section 26 the moiety of the penalty would be to be paid to the county treasurer. But it is said, that because borough justices act, the place for which they act is the borough, and therefore that the moiety of the penalty must be paid to the treasurer of the borough as treasurer of the place for which they act. If that be a right view there would be a great difficulty in saying to whom the penalty should be paid, if one county justice and one borough justice joined in a conviction under this Act. Secondly, the term "place" means a place which has a separate Court of Quarter Sessions, for the provisions of the Act will not bear any other meaning. By section 25 of the Alehouse Act, the justices may on non-payment of the fine commit the offender to the gaol or house of correction of the county or place for which they are acting. Now, a town corporate has no gaol if it has no Court of Quarter Sessions or gaol delivery : *Reg. v. Taylor* (3). In section 4 and in section 7 the like meaning must be imposed on the word "place." The latter section gives county justices power to act for the division or place when other justices are disqualified. That clause would not be necessary unless the "place" had a separate jurisdiction, for without such a clause county justices might act in a town corporate which had no separate Quarter Sessions. Section 83 directs convictions to be returned to the next Quarter Sessions holden for the county or place where the offence has been committed. "Place," therefore, clearly means a place having a Court of Quarter Sessions. In section 87, in the definition of "treasurer of a county or place," the expression "having charge of the funds out of which the costs of the prosecutions are paid" applies to the whole sentence, and therefore clearly denotes

(1) 57 R. R. 584 (2 Q. B. 72 ; 10 L. J. M. C. 138).

(2) 21 R. R. 386 (2 B. & Ald. 533).

(3) 1 Salk. 343.

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only such places as have costs of prosecutions to pay, *i.e.*, places having separate Courts of Quarter Sessions.

l'ashley replied. * * *

Cur. adv. vult.

[47] JERVIS, Ch. J. now delivered the judgment of the COURT :

Whether the defendant is guilty or not guilty in this case depends on the construction of the statute 9 Geo. IV. c. 61 ; and we are of opinion that upon the proper construction of that statute the defendant is guilty, and was properly convicted. The penalty for the non-payment of which to the treasurer of the county of Northumberland the defendant has been convicted, was in this case imposed under the Alehouse Act, 9 Geo. IV. c. 61, by justices acting for the borough of Tynemouth, which has a commission of the peace, but no Court of Quarter Sessions ; and the question is, whether that penalty ought to be paid to the treasurer of the county or to the treasurer of the borough on account of the borough fund. By section 26 of the Alehouse Act, so much of the penalty as is not awarded to the prosecutor is to be paid to the treasurer of the " county or place " for which the justice was acting when the penalty was imposed. The defendant's counsel contends that the word " place " must be understood in its ordinary sense, and that inasmuch as the justices were acting for the borough of Tynemouth when the penalty was imposed, the treasurer of that borough is the person who ought to receive the penalty, and that it ought to be applied to the borough fund under the provisions of the statute 5 & 6 Will. IV. c. 76, s. 126 (1). On the other hand, the prosecutor asserts that the word " place " as used in that section means a place for which a Court of Quarter Sessions is held. This, we think, is the right construction. In many of the sections in which the words " county or place " are used it is manifest that the latter word applies only to cases where Quarter Sessions are held. For instance, by section 37 parties aggrieved may appeal to the next General or Quarter Sessions of the peace of the " county or place " wherein the cause of complaint arose ; and by section 33 (2), the conviction is to be returned to the next General or Quarter Sessions of the peace for the " county or place " wherein the offence shall have been committed. The interpretation clause shows further, that it was intended that those penalties should be applied towards

(1) See now Municipal Corporations Act, 1882, s. 142.

(2) Rep. 35 & 36 Vict. c. 94, s. 75.

the costs of public prosecutions, and not to a borough fund, because it explains the words treasurer of a "county or place" to mean an officer acting in such capacity, or charged with the receipt and expenditure of monies from and out of which the costs of public prosecutions have been usually defrayed. The person to receive the penalty is to be an officer acting in the capacity of treasurer of monies from and out of which the costs of public prosecutions have been usually defrayed. In the same spirit the justices in Quarter Sessions are by section 29 authorized to indemnify the justices from their costs upon an appeal in certain cases, and to order the treasurer of the "county or place" in and for which the justices acted to pay the amount. At the time the Alehouse Act passed corporations had private property, but no borough fund, properly so called, over which the Legislature could with justice exercise a controul. The treasurer of the place meant in this section must clearly be treasurer of a place having a Court of Quarter Sessions, an officer under the controul of the justices making the order with the fund under their controul (1). It would be strange that the same word should give to one fund, the borough fund, all the penalties for good convictions, and charge upon another fund, the county rate, all the costs for convictions which could not be sustained. For these reasons, we think the conviction right.

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—•—
Conviction sustained.

(CROWN CASE RESERVED.) (2)

REG. v. MILLARD (3).

(22 L. J. M. C. 108—109; S. C. 1 Dears. C. C. 166; 17 Jur. 400; 1 W. R. 314; 21 L. T. O. S. 108.)

1853.
April 23.
[108]

Section 24 of the stat. 8 Geo. IV. c. 30 (4), gives a magistrate jurisdiction to convict summarily in cases of malicious damage to property. Section 30 (4) "for the more effectual prosecution of all offences punishable on summary conviction," enacts, that when any person shall be charged on the oath of a credible witness before any justice with such offence, such justice may summon the party, and if he do not appear, may determine the case *ex parte*, or issue his warrant to apprehend the party; or without summons may issue his warrant, and the justice before whom the party charged shall appear or be brought shall hear and determine the case: Held, that

(1) This passage, beginning with the words "The treasurer," was adopted by DARLING, J., *R. v. West Riding Justices* [1900] 1 Q. B. at p. 298.

(2) *Coram* JERVIS, Ch. J., PARKE, B., ALDERSON, B., WIGHTMAN, J. and CRESSWELL, J.

(3) Cited, *Blake v. Beech* (1876) 1 Ex. D. 320, 329, 330, 45 L. J. M. C. 111, 34 L. T. 764; *R. v. Hughes* (1879) 4 Q. B. D. 614, 625, 628, 48 L. J. M. C. 151, 40 L. T. 685.

(4) Rep. 24 & 25 Vict. c. 95; see now Malicious Injuries Act, 1861 (24 & 25 Vict. c. 97).

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section 30 did not controul the effect of section 24; and that it was not necessary that there should be an information on oath to give the magistrate jurisdiction to hear the case when the party charged with an offence under the Act appeared before him.

THE following case was stated by WIGHTMAN, J. :

The defendants were indicted for perjury in the evidence they gave before two magistrates, upon the trial of an information under the Malicious Trespass Act, 7 & 8 Geo. IV. c. 30, s. 24.

Mr. Robertson, a gentleman of the county of Pembroke, laid an information (but not on oath) before a justice of the peace against a person of the name of Wiggin, for wilful damage to the carriage of the complainant. A summons was issued against Wiggin to appear to answer the charge, and he appeared accordingly, and the defendants, Thomas Millard and Henry Millard, were examined as witnesses against Wiggin, and the indictment was for perjury upon that examination.

It was objected, for the defendants, that, to give the magistrate jurisdiction the information must, by the 30th section of the Act, be on oath, which it was not in the present case. I thought that the magistrate had jurisdiction, and that the omission to lay the information on oath was an error in procedure only; but as the case was one of very general application, I reserved the point for the opinion of the Court of Appeal.

Terry, for the prisoner :

An indictment for perjury must allege that the perjury was committed in the course of a judicial proceeding, and such allegation must be proved. Here there was no proof of any judicial proceeding, as the evidence showed that the information on which the magistrate acted was not on oath.

(PARKE, B. : A magistrate cannot proceed without an information laid before him; but the rule of law is, that unless a statute expressly requires it, the information need not be on oath, or even in writing: *Basten v. Carew* (1), *Wilson v. Weller* (2). The question is, whether section 30 makes it a condition in all cases of summary conviction under the Act that the information shall be on oath.)

It is submitted that it does.

JERVIS, Ch. J. :

We are all of opinion that the conviction is right. Section 24 of
(1) 27 R. R. 453 (3 B. & C. 649; 3 (2) 1 Brod. & B. 57.
1. K. B. 111).

the Act gives a magistrate jurisdiction to convict in all cases of wilful damage to property not specially provided for in the Act. The question is, whether section 30 makes it necessary that the information should be on oath in all cases. Had section 30 been omitted from the Act, it is clear that it would not have been necessary that the information should have been on oath. An information need not even be in writing, unless required by a statute, as has been observed by my brother PARKE. It seems to me that section 30 is not engrafted on section 24, but it is added "for the more effectual prosecution of offences punishable by summary conviction." If the party charged appear before the magistrate his jurisdiction is founded to hear and determine the case; but if the party does not appear, the proceedings must be taken under section 30, and there must be an information on oath in order *to justify an *ex parte* proceeding. Many things may be done by the justice when there is an information on oath which could not be done without it. We think that section 30 only gives a cumulative remedy. This view is fortified by a consideration of the language of section 29, which is in strong contrast with that of section 30, for section 29 commences with the words, "That the prosecution for every offence punishable on summary conviction under this Act shall be commenced within three calendar months after the commission of the offence," while section 30 begins with the words, "and for the more effectual prosecution of all offences," &c. We think that my brother WIGHTMAN said properly that the information on oath was a matter of procedure only and not necessary to found the jurisdiction of the magistrate.

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The other Judges concurred.

Conviction affirmed.

REG. v. THE JUSTICES OF ST. ALBANS.

(22 L. J. M. C. 142—143; S. C. 1 C. L. R. 536; 17 Jur. 531.)

If a turnpike road be out of repair, a single justice has no power under the General Highway Act, 5 & 6 Will. IV. c. 50, s. 94, to summon the surveyor or other officer of the turnpike road to appear before the justices at a Special Sessions for the highways.

The justices at such Special Sessions have no authority to make an order on such officer of the turnpike road to repair the road or to pay money to be applied to the repairs of it if the turnpike trust funds are insufficient, nor without giving such officer an opportunity of showing the condition of the funds.

Where the clerk of the trustees of a turnpike road which was out of repair had been summoned by a single justice, and two justices, at a Special

1853.
May 7.

Bail Court.

[142]

REG.
v.
THE
JUSTICES OF
ST. ALBANS.

Sessions for the highways, without allowing the clerk to show that the turnpike funds were insufficient, made an order convicting him in a penalty and directing him to repair the road in a specified time: Held, that though the *certiorari* was taken away by the Act, this order was so entirely without jurisdiction that a *certiorari* might issue to bring up the order to quash it.

THIS was a motion for a *certiorari* to bring up, for the purpose of quashing, an order of two justices, convicting one Palmer, clerk of the trustees of a turnpike road in the parish of Rickmansworth, in the county of Hertford, in the sum of 1s., on account of the road being out of repair; and also ordering him to repair the said road in question within twenty-eight days.

It appeared by the affidavits that the portion of road in question was part of a turnpike road in the parish of Rickmansworth, and had been out of repair for some time. An information was, in consequence, laid before a single justice, under the General Highway Act, 5 & 6 Will. IV. c. 50, s. 94, stating that the road was out of repair, and that the trustees of the turnpike trust were liable to repair it. On this information a summons was issued by the single justice to the clerk of the trustees, calling on him to appear before the justices at a Special Sessions for the highways. The clerk appeared before two justices at Special Sessions, and urged that the tolls were insufficient to repair the road, and offered evidence to prove that fact; this the justices refused to hear, and appointed a person to view the road; and on his report that the road was out of repair, at a subsequent Special Sessions, where the clerk appeared and urged the same defence, they made the order complained of.

Hawkins and Codd showed cause:

The *certiorari* ought not to go. The order of the justices is perfectly valid. It is founded on the 94th section of the General Highway Act, 5 & 6 Will. IV. c. 50. It is not a sufficient justification for the clerk to say that the trustees are out of funds, as by the local Act they have the means of raising funds. Further, the *certiorari* is taken away by section 107 of the 5 & 6 Will. IV. c. 50. Assuming that the justices had jurisdiction to a certain extent, but have partially exceeded that jurisdiction, such partial excess is no ground for the *certiorari* going: *Reg. v. Hyde* (1).

(COLERIDGE, J. : In that case there was a doubt whether there was an excess of jurisdiction or not; and the Court distinguishes between the cases where there is a doubt and where there is a clear

excess of jurisdiction. If *George v. Chambers* (1), be law, the justices had no right to convict.)

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ST. ALBANS.

In that case the party summoned did not appear at the first Special Sessions.

Bramwell and Wells, in support of the rule, were not called upon.

COLERIDGE, J. :

I think that this rule must be made absolute. It appears to me that the justices have proceeded upon a misconstruction of the Act of Parliament. The section upon which they have acted is not found in the General Turnpike Act, but in the General Highway Act. The whole enacting part of the clause is chiefly directed to proceedings against a parish *surveyor of highways in respect of a parish highway, in which case a single justice may summon the surveyor to appear before the justices at a Special Sessions for the highway; and they are then to take the prescribed steps for ascertaining by a day appointed, the condition and state of the highway, and if, on the day appointed, it shall appear to the justices at the Special Sessions that the highway is not in a state of thorough and efficient repair, they are then to proceed to convict the surveyor of the previous offence of letting the highway be out of repair, and they are to order him to repair the highway within a certain time; if it be not put in repair by the time specified, they are to make a second order, that a sum of money be paid by the surveyor equal in amount to the amount of the sum required for the repairs, which money is to be recoverable as any forfeiture under the Act. Then it occurred that the highway might be part of a turnpike road; the proviso therefore adds, the said justices shall summon the surveyor or other officer of the turnpike road. So that a single justice has no power to issue such a summons in the case of a turnpike road. The proviso does not say in terms what is to be done when the justices have brought the officer of the turnpike road before them, but it provides that if an order is to be made directing a sum of money to be paid, that such "order shall be made on the treasurer or surveyor or other officer of such turnpike road, and shall be recoverable as aforesaid." The proviso gives no authority to convict, and says nothing about the first order to repair, but only as to the order to provide a sum of money for doing the repairs. *George v. Chambers* has decided,

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(1) 63 R. R. 554 (11 M. & W. 149; 12 L. J. M. C. 94).

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and most properly, that the justices cannot proceed to do that till they have first ascertained the condition of the turnpike trust funds; and if so, it is, of course, clear that they are not to make such an order on the officer when there are no public funds to which he may have recourse. The justices ought, I think, to have shown that they had in the first instance, before making an order, inquired into the condition of the turnpike funds, and as they have not done so, they have done what is wrong. The only remaining question is, whether the *certiorari* is taken away. As I am of opinion that they have proceeded entirely without jurisdiction in making this conviction, and in making an order in the terms that they have used, I think that the *certiorari* ought to go to bring up this order for the purpose of quashing it.

Rule absolute.

1853.
June 13.
Bail Court.
[143]

REG. v. JABEZ DAVIS (1).

(22 L. J. M. C. 143—144.)

A few days after D. had left his father's house, his last place of abode, and sailed for America, a summons calling upon him to answer the charge of being the putative father of a bastard, was left for him at his father's house. An order of affiliation, which recited that the summons had been duly served on D., was made against him in his absence from the country. On an application for a *certiorari* to bring up and quash the order made by D. on his return from America, he swore that he did not leave home with any intention of avoiding service of the summons, but he did not deny that he was the father of the child. The COURT refused the *certiorari*.

THIS was a motion for a *certiorari* to bring up a bastardy order for the purpose of quashing it.

The affidavits showed that Jabez Davis, the applicant, who, up to the 7th of November, 1850, resided in his father's house in England, on that day left his home and went to Liverpool with the intention of proceeding at once to America. He swore that he left home without any suspicion that any application for an order of affiliation was about to be made against him, and without any intention of avoiding service of any summons for such a purpose. He remained at Liverpool until the 11th of November, when the ship sailed with him to America. On the 15th of November, a constable called at his father's house with the view of serving Davis with a summons to appear before the justices to answer the *charge of being the putative father of a bastard child, and left the summons. The constable was informed that Davis had gone to America. On

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the 3rd of December the justices made an order which, after reciting that "Jabez Davis, having been duly served with a summons to appear," &c., "as is now proved before us," did not appear at the hearing, adjudged Davis to be the father of the bastard, and directed him to pay a certain sum for its maintenance. Davis remained in America until the end of the year 1852, and arrived again at his father's house on the 4th of January, 1853, when he first learned that the order of affiliation had been made. In two days afterwards he was arrested for not having complied with the order.

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v.
DAVIS.

Willes, in support of the motion :

This *certiorari* ought to issue. The provision of the statute, 7 & 8 Vict. c. 101, does not preclude the applicant from relief. It is true that in section 3(1), it says that, "on proof that the summons was duly served on such person or left at his last place of abode, six days at least before the Petty Session," the justices may proceed in the absence of the party charged. But that section cannot, it is apprehended, apply to a person who at the time of the service is beyond the jurisdiction of the Courts of this country, and who cannot by any possibility know of the summons in time to appear before the justices, or to appeal against the decision. If the statute applies to this case, the order is conclusive and the applicant can have no relief at all. This Court has a jurisdiction over the question of proper service of summons in cases of bastardy orders. The justices can only make an order on proof that the summons has been duly served, and if the justices are deceived, this Court will annul their order. In *Reg. v. Evans* (2), it was decided, that where service of the summons was made at a wrong place of abode, the order of bastardy was void, and might be removed by *certiorari*, though it was alleged in the order that the summons had been duly served. Here Davis's last place of abode was not his father's house where the summons was served, but at Liverpool.

(WIGHTMAN, J.: The mere going to an inn at Liverpool while waiting to embark would hardly make the inn his place of residence. I think you must take it that the father's house was the last place of residence.)

(1) Rep. by the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 2. See now s. 4 of that Act. (2) 87 R. R. 894 (19 L. J. M. C. 151).

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DAVIS.

If so, still the order is not warranted. The statute says that the summons must be served personally or left at the last place of abode. Here the order recites that it was duly served. It ought to have stated that it was served at his last place of abode. This objection is not merely technical, for if the justices supposed that Davis had been personally served they would naturally proceed to hear the case and decide without further delay; while if they had been told that the summons had only been left at the house and that the man was gone to America, and could have had no notice of the proceedings or power of appearing before them, they might in their discretion have declined to go on with the case in the absence of the party charged.

(WIGHTMAN, J. : The statute, in effect, says, the summons may be served either by personal delivery or by leaving at the last place of abode. You had better argue the case as if the order had said that the summons was duly served by leaving at the last place of abode.)

The justices were misled into supposing that the order was duly served. Great injustice may have been done.

(WIGHTMAN, J. : Does Davis swear that he is not the father of the child ?)

No; but it is not necessary that he should.

WIGHTMAN, J. :

It may then be that the proceeding is well founded and that no injustice has been done. The proceedings are perfectly in form according to the statute. To furnish any ground for setting aside any proceedings regular on the face of them your case should be that an unjust charge had been attempted to be fastened on him by reason of his absence. But your affidavits do not show that the charge is unfounded.

Rule refused.

CHANCERY.

EX PARTE FERMOR (1).

(1 W. R. 43.)

The Court will never act on the allegation of the decease of a lunatic without proof of that fact by affidavit.

1852,
Nov. 22.

KNIGHT
BRUCE, L.J.
[43]

WICKENS applied for leave to examine the will of the lunatic in this case, which was in the custody of the Master. He had died, as it was alleged, on Friday last, at Brighton, and had given directions in his will as to the manner of conducting his funeral. There was no affidavit of his death, although two letters had been written by the committee of the person announcing the fact. Under the plea of the urgency of the case the learned counsel asked the Court to make the order without proof of the death.

LORD JUSTICE KNIGHT BRUCE :

We cannot do so—it is impossible to entertain any such application without positive proof of the alleged death. Judicially the lunatic is still living, and may be so in reality.

BRYSON *v.* WARWICK AND BIRMINGHAM CANAL COMPANY AND OTHERS (2).

(1 W. R. 124 ; S. C. 20 L. T. O. S. 154.)

1853,
Jan. 20.

STUART,
V.-C.
[124]

Depositions taken before an Examiner who had died before affixing his signature to them, allowed to be received in evidence as if they had been duly signed.

DE GEX moved, that the original depositions taken in this cause by T. H. Plomer, deceased, late one of the Examiners in this Court, of the several witnesses examined in the cause, and signed by the said several witnesses, might be transmitted to the Record Office of this Court by K. S. Parker, Esq., one of the Examiners appointed in place of T. H. Plomer, and that the same might be received in evidence in this cause, in the same manner as if the same had been authenticated by the signature of the said T. H. Plomer.

The depositions had all been taken in Mr. Plomer's handwriting, but had not received his signature before his decease.

(1) Lunacy Rules, 1892, r. 47.

(2) B. S. C. Ord. XXXVII. r. 16.

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BIRMINGHAM
CANAL
COMPANY.

Elderton, Bagalley, Hallett, Southgate, Cadman Jones, for the several parties, did not oppose the application.

C. Jones submitted that he ought to be at liberty to cross-examine again some of the witnesses.

STUART, V.-C., granted the application, and said that the exhibits must be verified by affidavit and that there ought not to be any fresh cross-examination of the witnesses.

1853.
Jan. 20.

HOWARD v. SEWELL (1).

(1 W. R. 124.)

STUART,
V.-C.
[124]

Motion for leave to examine a witness after decree refused with costs, such a special application not being justified by the Act 15 & 16 Vict. c. 86, s. 41 (2).

W. H. TERRELL moved that the defendants might be at liberty to examine the steward of a manor, for the purpose of proving a custom, before the Master or the Examiner, after the hearing of the cause. The steward had declined to make an affidavit. Master Tinney had refused to examine him; and by the old practice, the examination of a witness after decree could only be obtained by a note from the Master to the Examiner.

Rogers opposed the motion:

The proper course of proceeding under the circumstances was to obtain a *subpœna*. He referred to 15 & 16 Vict. c. 86, s. 41.

STUART, V.-C., said that the Examiner had very properly refused to examine the witness in the absence of a *subpœna*. The words of s. 41 were very plain: "such evidence shall be taken, as nearly as may be, in the manner hereinbefore provided, with reference to the taking of evidence with a view to such hearing." The usual course must be pursued which would have been adopted before the hearing. The making of this special application was not in accordance with s. 41, and the motion must be refused with costs.

(1) Cited, *Raymond v. Tapson* (1882)
22 Ch. Div. 430, 432, 48 L. T. 403.

(2) Repealed. See now R. S. C.
Ord. XXXVII. rr. 5, 20.

IN THE QUEEN'S BENCH.

REG. v. STOWMARKET.

(1 W. R. 147; S. C. 17 J. P. 84.)

1853.
Jan. 26.

[147]

A pauper who has resided in the parish of U. for five years continuously up to the date of an order for her removal is not removeable to S., although during that five years she married a man whose settlement was in S., and who died during the five years.

In this case the question was, whether an order for the removal of Hannah Rosier, a widow, a pauper, and her five children, from the parish of Ufford to the parish of Stowmarket should be confirmed subject to the opinion of this Court on the following case.

The pauper was born and lived in the parish of Ufford, and in 1848 she married one Robert Rosier, who was settled by apprenticeship in the parish of Stowmarket. From that date the pauper and her husband resided without interruption in the parish of Ufford until the death of R. Rosier in 1850. He had resided in Ufford for three years and six months up to the time of his death. After the death of R. Rosier, the pauper had resided continuously in the parish of Ufford up to 19th May, 1852, and been chargeable to Ufford up to that time from the date of the husband's death.

The question for the opinion of this Court was, whether Hannah Rosier and her children were irremoveable from the parish of Ufford on 12th May, 1852, under 9 & 10 Vict. c. 66.

Bodkin, in support of the order :

The question really raised, in this case is, whether the pauper, having been married during the five years, and only three and a half years having expired at the time of her husband's death, she has the privilege of not being removeable to her husband's settlement at Stowmarket. He cited *R. v. Glassop* (1).

Dasent, *contra*, not called upon.

LORD CAMPBELL, Ch. J. :

This order must be quashed—there is no distinction between this case and that of *R. v. Glassop*, which must be taken to govern this case.

Order quashed.

(1) 76 R. R. 225 (12 Q. B. 117).

CHANCERY.



RE GARTSIDE'S ESTATE (1).

(1 W. R. 196—197.)

1853.

Feb. 12.

WOOD, V.-C.

[196]

The Court will on petition appoint a new trustee in the room of an infant appointed trustee by the testator together with two other persons, and who has himself a beneficial interest.

[*197]

THE petition in this case prayed for the appointment of a new trustee in the place of an infant and for a vesting order. The testator by his will gave all his estate to his wife and daughter and his youngest son upon certain trusts, under *which that son took some beneficial interest. The property consisted among other things of mines, which it was most desirable to let on lease, and the present application was therefore necessary.

Little for the petitioner cited Hearle v. Greenback (2).

WOOD, V.-C., said there were two questions here; first, the infant had a beneficial interest, and secondly, he was appointed by the testator himself. The first was provided for by the Act; for by the interpretation clause the Act (3) was to apply to cases where the trustee had a beneficial interest; and the words of the 32nd section were so wide that he thought they would obviate the second objection; and he accordingly made an order according to the prayer of the petition.



RE LONG'S ESTATE.

(1 W. R. 226; S. C. 20 L. T. O. S. 305.)

1853.

Feb. 24.

STUART,
V.-C.

[226]

Where lands which were subject to a lease were taken for the purposes of a company, and the purchase-money in respect of the leasehold interest was invested under the Lands Clauses Act, the company was ordered to pay the costs of the half-yearly sales of stock for the purposes of distribution.

A LEASEHOLD interest in certain lands at Rotherhithe had been devised to trustees for the separate use of Lady Sydney for her life, with remainders over. The lands subject to the lease had been

(1) See Trustee Act, 1893, s. 25. The appointment should be without prejudice to any application by the infant to be restored to the trusteeship

on his coming of age: *In re Shelmerdine* (1864) 33 L. J. Ch. 474.

(2) 3 Atk. 695.

(3) Trustee Act, 1850, now repealed.

taken by the Commercial Dock Company under their powers. An award was made in September, 1852, fixing the purchase-money of the leasehold interest in the land at 735*L.*, which had been invested and was standing in the name of the Accountant-General to the credit "*ex parte* the Commercial Dock Company." Sixteen years and a half of the term remained at present unexpired. The object of the present petition was that 22*L.* 5*s.* 5*d.*, being $\frac{3}{5}$ *rds* of the 735*L.*, might be paid to Lady Sydney (the petitioner) for her separate use, the remaining balance to be paid into Court, and then $\frac{1}{3}$ *rd* to be paid to her half-yearly during her life.

Re
LONG'S
ESTATE.

Buxton, in support of the petition.

G. L. Russell, for the executors.

G. M. Giffard and *Roche*, for the tenants in remainder, asked that their costs might be paid by the Company.

Druce, for the Company, objected to the Company paying the costs of the annual sales of stock, as such was a special arrangement for the convenience of the parties.

STUART, V.-C., made the order as prayed, and directed the costs of all parties to be paid by the Company, including the costs for sales incidental to the distribution of the fund.

EX PARTE CONYBEARE'S SETTLEMENT (1).

(1 W. R. 458.)

Under special circumstances, the Court will appoint one of the cestui que trusts as trustee of an estate.

CONYBEARE moved for the appointment as trustee of one of the cestui que trusts of an estate in the place of a trustee incapacitated from acting, in consequence of insanity. All parties were desirous that the appointment of the gentleman proposed should be made, and there were special circumstances in the case not necessary to be referred to for the purposes of the report. The MASTER OF THE ROLLS had declined to make the order asked, on the ground that the Court ought not to appoint a cestui que trust as the trustee, even though there was not any other objection to his appointment.

(1) Trustee Act, 1893, s. 25; *Re Clissold's Settlement* (1864) 10 L. T. N. S. 642

1853.
June 24.

TURNER,
KNIGHT
BRUCE,
L.JJ.

[458]

Ex parte
CONYNGHARE'S
SETTLEMENT.

TURNER, L. J. :

Under ordinary circumstances, no doubt the Court will not appoint a trustee who is also one of cestui que trusts; but the rule is not imperative; and when there are special circumstances, the Court will exercise its discretion in judging whether the case is one in which the rule may be departed from. Here I think, under the special circumstances, we may make the appointment asked.

KNIGHT BRUCE, L. J., concurred.

1853.
July 22.

IN RE THE TRUSTEES OF THOMAS FISHER'S WILL.

(1 W. R. 505.)

WOOD, V.-C.
[505]

Order vesting leaseholds in continuing and new trustees as joint tenants (Trustee Act, 1850, s. 34 (1)).

BIRD asked for an order for an appointment of two new trustees to act jointly with a continuing trustee, and for an order to vest the legal estate in certain leaseholds (held by the old trustee by way of mortgage), and the right to sue in the three jointly.

WOOD, V.-C., said, he thought it would be a reasonable construction of the Act to hold that he could make an order vesting the estate in the three as joint tenants.

1853.
July 30.

EX PARTE THE LONDON, TILBURY, AND SOUTHEND RAILWAY COMPANY.

(1 W. R. 533.)

WOOD, V.-C.
[533]

Petition for payment into Court of the difference between the sum deposited in the Bank under sec. 85 of the Lands Clauses Consolidation Act, 1845, and the whole of the purchase money ultimately agreed upon, and for investment and payment of dividends of the whole to the tenant for life.

THE Railway Company in this case had, under sec. 85 of the Lands Clauses Act, deposited in the Bank, to the credit of the trustees the landowners, the sum of 250*l.*, previously to their entry upon the lands. The purchase money was subsequently fixed by arbitration at 300*l.* The Accountant-General declined to receive less than the 300*l.*, under sec. 69.

A petition was presented by the trustees, and consented to by the Company, for payment into Court of the 50*l.*, to the same

(1) As to vesting orders, see now Trustee Act, 1893, s. 26.

account as the 250*l.* already deposited, and for the investment of the whole 300*l.*, and payment of the dividends to the tenant for life.

Williams for the petitioner.

J. T. Wood for the Company.

Wood, V.-C., made the order asked for.

Ex parte
THE
THE LONDON,
TILBURY,
AND
SOUTHEAST
RAILWAY
COMPANY.

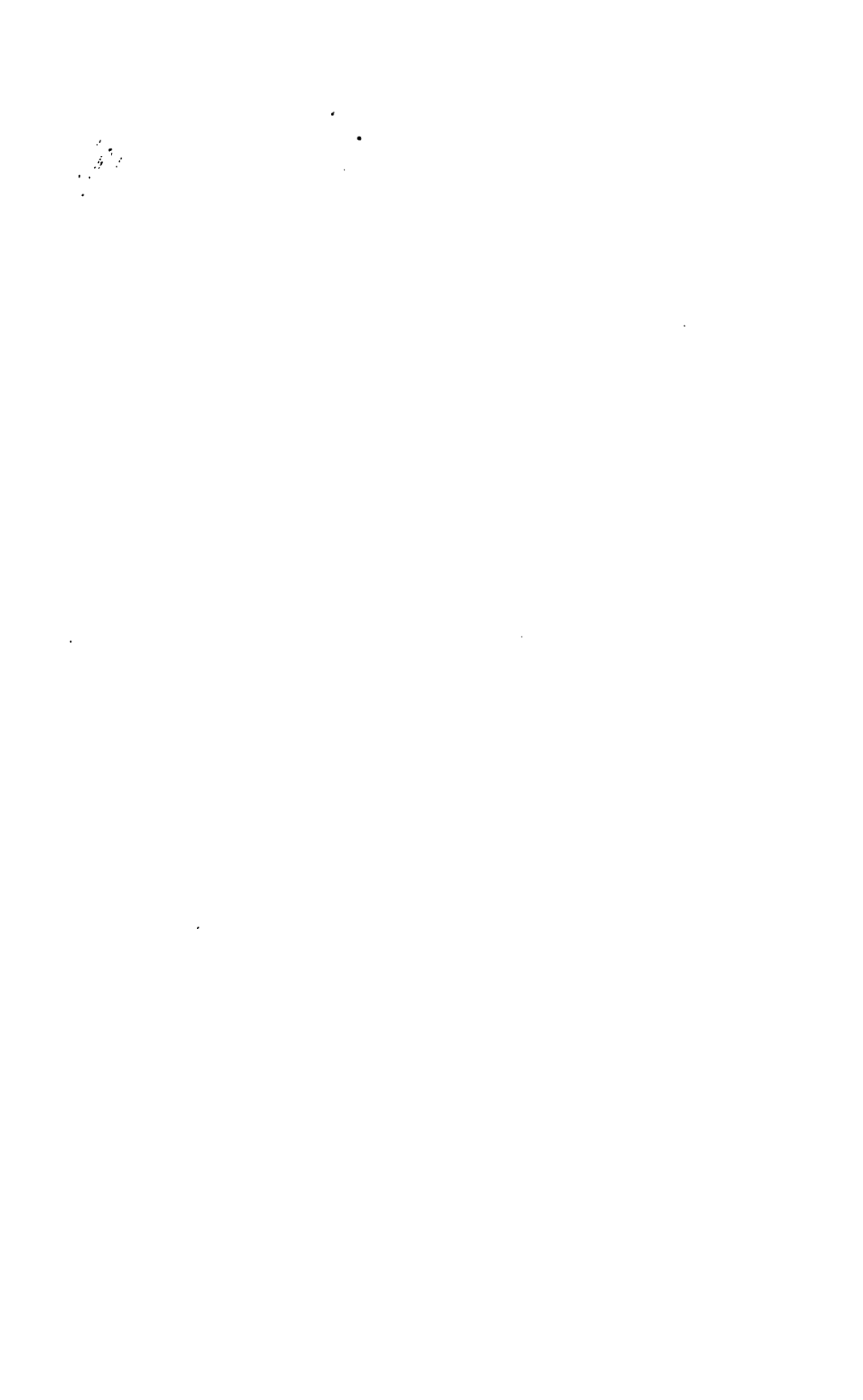
CAMBOTTLE *v.* INNGATE.

(1 W. R. 533.)

1853.
Aug. 1.

A foreigner temporarily resident in this country will not be compelled to give security for costs while he remains in this country.

[Approved in *Redondo v. Chaytor* (1879) 4 Q. B. Div. 453, 456, 458, 48 L. J. Q. B. 697, 40 L. T. 797; but see now R. S. C. Ord. LXV. r. 6A.]



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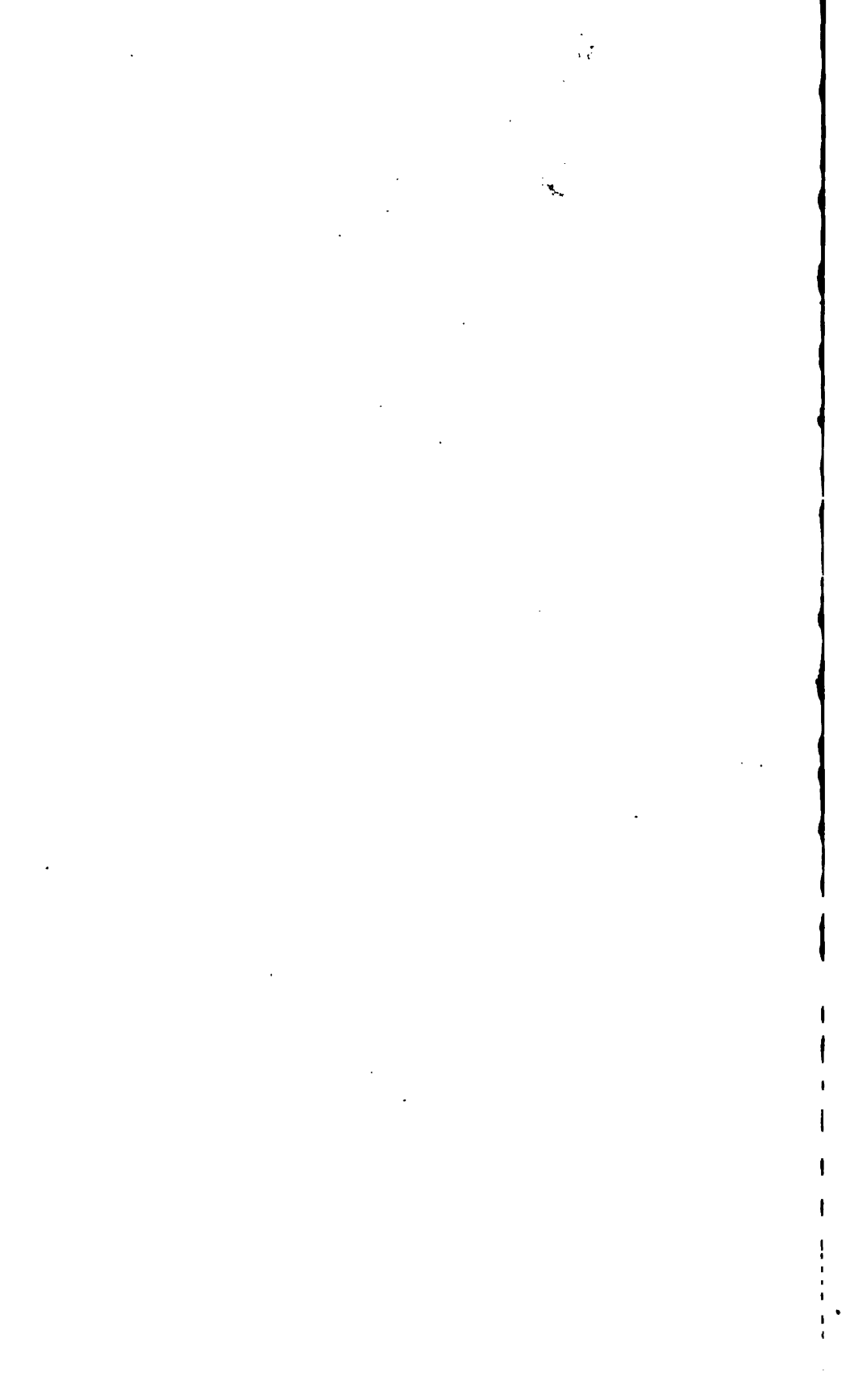
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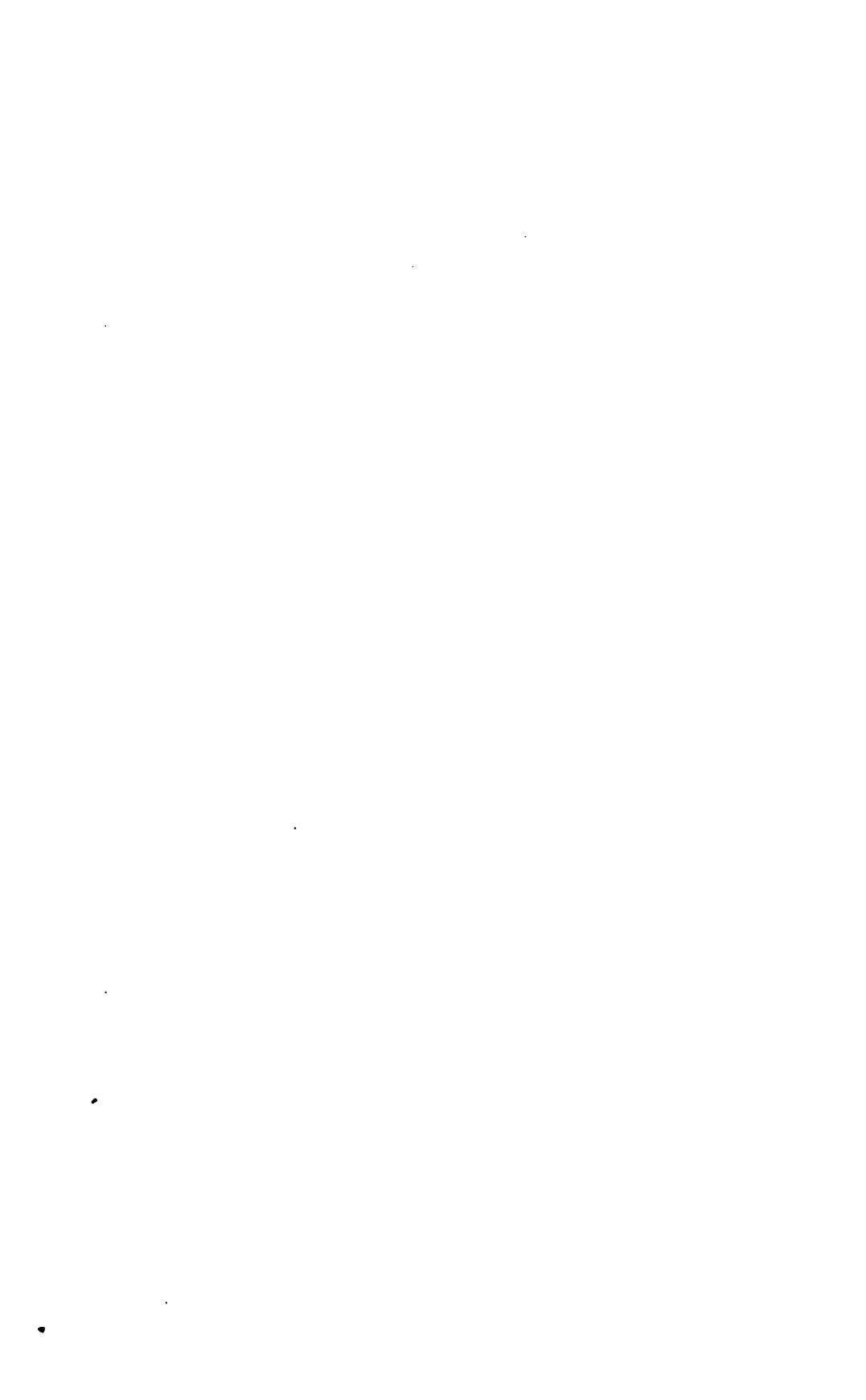
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